

No. 2171

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.
(*In Three Volumes.*)

JAMES T. BARRON,

Appellant,

VS.

CLAIRE J. ALEXANDER,

Appellee.

VOLUME III.

(Pages 497 to 755, Inclusive.)

Upon Appeal from the United States District Court for
the District of Alaska, Division No. 1.

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(Testimony of C. J. Alexander.)

Q. What do you call the first end?

A. From corner No. 1, I think, the westerly corner.

Q. All right.

A. From that westerly corner on up across this which is [458] described as the sandy beach—

Q. Where is that?

A. —in the complaint, that would be in front of the little cabin here—on the upland.

Q. All right.

A. From this corner in fact over to about here, I should judge.

Q. (By Mr. CHENEY.) Is it here that is?

A. Well, that is just a little bit to the easterly of the cabin in fact.

Mr. JENNINGS.—All right.

Q. Say thirty or forty feet?

A. That is definite enough to get it. That is low lying land in here. Here a cliff or bluff commences and continues to about a line with this trap would come out if it was continued to the shore, but it don't look right to me.

Q. Now, wait a minute; let's get that in the record. The bluff begins about the point marked "high" there—"high"—

A. Let's see; in relation to the cabin goes—why, I should say right about where that "h" is.

Q. All right; where the first "h" of "high" is?

A. Yes, sir.

Q. Now, how far up do the bluffs extend—how far towards the east end of the claim do they extend?

A. Well, they extend up here to where this—the

(Testimony of C. J. Alexander.)

line of this lead if it were continued on in a straight line would come out at high-water mark.

Q. All right. Then it is about the point that is marked three hundred eighty-five feet?

A. Yes, sir; yes, sir.

Q. All right. And the next—

A. And then, the beach from there on to corner No. 2 is very [459] similar in formation to the easterly beach and the extreme westerly end of the claim.

A. All right. I want to ask you about those bluffs—do they extend clear down to the line of high-water mark?

A. Yes, they extend clear down there; yes; nearly to the line of high-water mark.

Q. Is there any way to get from the upper end, the east end, of this claim down to the west end of the claim along the beach?

A. Why, you can get along the beach or there is the upland. The upland is accessible anywhere along there from one beach to the other on top of this cliff as it is described. This cliff that is described there isn't a great big high precipitous cliff, it is only a little bank.

Q. About how high?

A. Well, perhaps twenty feet, there is in the highest places, I would say; I don't think it exceeds twenty feet.

Q. All right. Now, how about the beach itself outside of this—of this little sandy place you are talking about?

A. Well, the formation of the beach is very much

(Testimony of C. J. Alexander.)

alike, that is the formation of the two ends of the claim in this—in the central part of the claim there—where this bluff is described is a solid formation of bedrock right out to extreme low-water mark.

Q. Kind of a hogback?

A. Well, it is, you might call it a hogback; it is just a continuation of the formation which you see on the upland only it is at a little lower level.

Q. Well, now, Mr. Alexander, have you made soundings there, all around there?

A. I have made soundings, a great many soundings; yes, sir, on all [460] sides of my trap.

Q. Are you familiar with the surface of the bottom of the ocean there?

A. I think I am very familiar with it, yes, sir.

Q. State whether or not in one portion of it—state whether or not it is about the same all in front of that claim. A. It is visible—

Mr. WINN.—Object to the question, not being proper cross-examination. I didn't go into this.

COURT.—It is hardly—

Mr. JENNINGS.—It is cross-examination this way, if the Court please; he dragged out of this witness—he is their witness, not our witness, and he dragged out of the witness that this did not obstruct except at one place. Now, on cross-examination we can ask him anything pertaining to the question as to whether it obstructs or does not obstruct, and one question as to whether it obstructs or does not obstruct is whether or not a building can be built in front of it.

(Testimony of C. J. Alexander.)

COURT.—Yes, it might be competent in that respect, Mr. Jennings, but it is really your case.

Mr. JENNINGS.—It is our case, your Honor, but Mr. Winn put our defendant on the stand and asked him questions and opened the whole thing, and I can ask him in cross-examination anything pertaining to which Mr. Winn brought out on direct examination.

COURT.—Yes, I think that is true.

Mr. JENNINGS.—If we want to we can develop our whole case on cross-examination of this witness because Judge Winn has thrown the doors open.

Mr. WINN.—I only threw the doors open to such questions as [461] I asked. I wish to make the objection he is an adverse witness.

COURT.—Well, the position counsel takes I take it, it doesn't make much difference whether put in now or some other time. The only reason is that it will be more logical to bring it out on your own case. But you may proceed, if you insist on it.

Mr. WINN.—But one thing, they aren't entitled to repeat it when they put him on the stand.

Mr. CHENEY.—Then, you won't be allowed to repeat it.

Mr. WINN.—I will take an exception.

Mr. CHENEY.—That rule will apply both ways, I presume.

COURT.—Yes.

Q. (By Mr. JENNINGS.) Tell us all about the soundings of the bottom of the ocean—what you found?

A. The termination of the rocky formation that

(Testimony of C. J. Alexander.)

extends between the high and extreme low-water mark is clearly visible on low water along the entire length of this claim and on below us for five or perhaps seven hundred or a thousand feet on below the claim and with the exception—

Q. (By the COURT.) I did not catch the first part of that answer. Would you repeat that?

A. The termination, that is the end of this rocky formation which extends out from high to low-water mark all along the face of this claim and on below for possibly five or seven hundred feet, or I would say a thousand feet is practically—that is, visible, on low-water *water* you can see the termination of the rocks where the rocks run off into the clear sand beach all the way along, with the exception, of course, of a little point running out here, and there just a short distance breaking the line of the rocks here and there; [462] and the whole formation in here as a matter of fact is a sand formation and nothing else.

Q. (By Mr. JENNINGS.) Now, when you say “in here” I want to get that in the record.

A. That is covering this entire bank.

Q. Covering the entire portion?

A. Entire bank.

Q. In front of the claim?

A. Yes, sir. And the bank extends from this rock down along in front of it.

Q. This rock called “reef”?

A. Reef, yes; as it is reef there, but the bank extends in this shape down that shore and as you gradually get below here it gradually cuts off, cuts off

(Testimony of C. J. Alexander.)

nearer the shore and down to here within five hundred feet below the claim.

Q. Below the eastern end of the claim?

A. Yes, sir. The bank is nearly entirely cut off. The water almost immediately gets very deep close to the shore because I would venture to say that a thousand feet below this—below the end of this claim or below this fish-trap you could stand on the shore line and throw a rock into twenty fathoms of water—the deep water runs that close to the shore.

Q. Yes, but I asked you as to what—I asked you about the surface of the bottom of the ocean there, what was it—what was it? A. Sand.

Q. Sand?

Mr. WINN.—Same objection.

COURT.—Same ruling. Exception allowed.

Q. (By Mr. JENNINGS.) It is just as good to complete a wharf [463] in one place as any other spot on this little hogback?

Mr. WINN.—Same objection.

A. The surface is just the same over that entire area.

Mr. JENNINGS.—It is cross-examination.

Mr. WINN.—It is part of your case.

Mr. JENNINGS.—It is cross-examination.

Mr. WINN.—I just want to get the objection.

COURT.—I understand.

Mr. WINN.—I say it is leading and not proper examination and this is the defendant in this case.

COURT.—Well, he is called as a witness, Judge, for the plaintiff.

(Testimony of C. J. Alexander.)

Mr. WINN.—Yes, I know, but I stated he is an adverse witness.

COURT.—I understand, anything that is germane to it or connected with his testimony in chief is cross-examination.

Q. (By Mr. JENNINGS.) Is there any reef—

Mr. WINN.—I will take an exception.

COURT.—Yes.

Q. (By Mr. JENNINGS.) Now, I understood you to have sounded all over there and are familiar with this shore line—is there any reason why a wharf cannot be built between—between the point on Exhibit “D” which is marked three hundred and eighty-five feet, the figures “385” and a dash and asterisk—is there any reason why a wharf could not be built from that point to the east end of the claim running out to deep water? A. There is none.

Mr. WINN.—Same objection and that no foundation laid for the witness to answer this, haven’t shown his qualification.

COURT.—He may answer.

Mr. JENNINGS.—You put him on the stand and I suppose vouch for his qualifications. [464]

Mr. WINN.—I didn’t put him on the stand for that purpose.

COURT.—Proceed.

A. I suppose—no feasible or scientific reason that I know of that a wharf could not be built there just as easy and well, in fact more economical than on the other end.

Q. (By Mr. JENNINGS.) More economical be-

(Testimony of C. J. Alexander.)

cause you would strike deep water sooner?

A. Yes, sir; wouldn't have to build so far.

Mr. JENNINGS.—That is all.

Redirect Examination.

Q. (By Mr. WINN.) Then, the reason why you continued the lead of this pile—this fish-trap after the hearing to dissolve the preliminary injunction was on the advice as given you by the attorneys; was it, Mr. Alexander?

Mr. JENNINGS.—Object as immaterial and irrelevant.

COURT.—That was brought out.

Mr. JENNINGS.—I know, but it is immaterial and irrelevant.

COURT.—He may answer.

A. Repeat the question again, Mr. Winn, please.

Q. (By Mr. WINN.) I asked if it is not a fact that you said a while ago to Mr Cheney that the reason why you continued this lead out the distance you say you did after the hearing on the preliminary injunction was that you followed the advice of your attorneys in that respect?

A. That is what inspired me to try to continue it, yes, sir.

Q. And that they advised you that Mr. Barron did not own that upland and that you had just as much right even to drive clear on to the upland as Barron had?

A. That was the substance of their advice; yes, sir. [465]

Q. Now, you did testify on this hearing, however,

(Testimony of C. J. Alexander.)

did you not, Mr. Alexander, that it was impossible for you to drive any more piles out in that direction along that lead line?

A. That I believe, yes, sir, I testified to that as my opinion at that time.

Q. Then, you did think at that time that your trap was complete, didn't you? A. Yes, sir.

Mr. JENNINGS.—Immaterial and irrelevant. Object.

COURT.—He has already answered.

Q. (By Mr. WINN.) And you so testified that your trap was then complete, didn't you?

A. No, I don't believe I did, that it was complete with the exception of a portion of the outside, Mr. Winn.

Q. Yes, complete with the exception of those eight piles you was going to put in?

A. Yes, I think so.

Q. Now, as to whether or not you could drive piles out further in that water was ascertained by you after the hearing was had on the motion to dissolve the temporary restraining order? A. Yes, sir.

Q. (By Mr. CHENEY.) Well, if the Court please, I don't like to interrupt; the counsel wasn't here when that case was tried; I was; no such motion to dissolve restraining order, no such motion in the records, no such motion ever made. Mr. Burton got that injunction out on Mr. Alexander on an *ex parte* application and had a hearing on complaint. We did not make any promises when it was dissolved and no strings on it.

(Testimony of C. J. Alexander.)

COURT.—It isn't material, I suppose. [466]

Mr. CHENEY.—That might identify the case.

Mr. WINN.—Yes, I understood there was a temporary restraining order in the first place granted and afterwards dissolved.

Mr. CHENEY.—We didn't make any motion.

Q. (By Mr. WINN.) Now, then, Mr. Alexander, did you—I understand you to testify that it is just as easy to come in and out to Barron's upland now as it was with your trap in the condition when that hearing was had before the Court before?

Mr. JENNINGS.—Object as immaterial and irrelevant.

COURT.—He may answer; it has been gone into.

WITNESS.—May I answer?

COURT.—Yes, sir.

A. Why, no, I did not say it was just as easy.

Q. (By Mr. WINN.) Well, now, Mr. Alexander, don't you know, as a matter of fact, that at that time your lead was five or six hundred feet away from high tide, maybe six or seven hundred feet, but at least five hundred feet from ordinary low-tide mark, don't you?

A. No, I think the evidence shows that we continued it on two hundred and forty feet further than it was originally.

Q. Do you know how many feet, Mr. Alexander, that you continued the driving of those piles that is indicated on this map, Exhibit "D," from the piles "Barron's piles" out to the end of the piles? Have you ever measured that?

(Testimony of C. J. Alexander.)

A. I don't think that I ever measured that additional distance that was covered there.

Q. Well, now, Mr. Hill has measured it, and the testimony is here, and that testimony is two hundred and sixty-one feet. Do you want the Court to understand that isn't correct? [467]

A. No, I wouldn't dispute that measurement.

Q. Now, let us see that, then, what that measurement—that is, two hundred and sixty-one feet to this end of the pile, that end pile standing on the tide land? A. No, no, sir.

Q. How far is it from that end pile to the nearest pile on the shore?

Mr. CHENEY.—What do you mean by the shore?

Mr. WINN.—The low tide.

A. Will you permit me to explain?

Q. The low tide—do you know how far it is?

A. I don't know offhand. I have all that data set down as it was taken—taken off the map—but I don't remember those data so many of them so completely.

Q. Well, it is a hundred and forty or a hundred and fifty feet?

A. Well, we will say maybe one hundred and forty, I don't know.

Q. Well, Mr. Hill has it one hundred and forty feet. You have no reason to doubt that as correct?

A. I have not; I don't think that is far amiss.

Q. That is low tide and how much farther up—that is low tide on March 11th? A. Yes, sir.

Q. Do you know approximately how much farther

(Testimony of C. J. Alexander.)

it is up from the low tide on March 11th to high tide line?

A. Why, I testified, I think, it was about one hundred feet from high tide to low tide mark.

Q. Well, if that is correct you have two hundred and sixty-one feet plus one hundred and forty, then plus this one hundred and some odd feet, which will bring it up to the neighborhood of some five or six hundred feet? [463]

A. I did not continue this lead.

Q. Oh, no; but I am giving the distance between where you had your piles driven in your lead when the hearing was had on the temporary restraining order, out to high-tide line?

A. I see; I understand the question.

Q. Then, you will be some five or six hundred feet?

A. Yes, sir; would be in that neighborhood.

Q. Now, you don't attempt to tell the Court, do you, Mr. Alexander, that a steamer the size of the boat that you have talked about and the size of the "Barron," "Anna Barron," and the size of the "Georgia," if they went in there could go in and circle around your trap just as easy now as they could when the trap was in the condition that it was in when the hearing was had on the preliminary motion, do you?

A. O, no; I don't contend that a boat would be able to go in there the size of the "Georgia" and circle around now.

Q. No, it wouldn't do it at all, now? A. O, no.

(Testimony of C. J. Alexander.)

Q. Then, as a matter of fact, don't you consider, Mr. Alexander, that in extending that out now in that way along, as the boats may come in there and around there, that has cut off the access to that claim? A. Not necessarily.

Q. Isn't obstructed at all?

A. The boats don't have to come in there and pretty nearly go around—around that trap in order to get access to that upland.

Q. Well, would you say it is just as easy for a boat to go in, say, on the left-hand side of the trap as you are going into Barron's property, just as easy for it to go in there and get out now as it was when you had that little dinky trap [469] at the other hearing?

A. It would if she went in there and came out the same way she went in. I have had boats in there under my own hand and between that rocky—

Q. Was you master of them?

A. I wasn't master of them, but I had charge of them and had charge of the vessel.

Q. Have you been master of any vessel?

A. I have been master of a great many boats in my time.

Q. Well, of what have you been in the waters up here?

A. Well, I have had several of my own boats, the schooner "———."

Q. What size boat is she?

A. A vessel of twenty-seven tons.

Q. About how long?

(Testimony of C. J. Alexander.)

A. Sixty-three feet, all over.

Q. What depth?

A. Draws six and a half feet light.

Q. Now, do you want the Court to understand—as you know something about navigation, and I want to find out if you know—do you want the Court to understand, knowing some of the conditions about navigation, that it is just as easy to go in and out of Barron's place on the left-hand side of the trap as you go in with your trap in the condition it is in now, as it was in at the time that preliminary hearing came up? A. Why, I think I would.

Q. You answered that question?

A. Yes, but I wouldn't hesitate for a minute to go in there with a small boat.

Mr. CHENEY.—Let him answer.

Mr. WINN.—He said he wouldn't hesitate—I just wanted his [470] expression.

Mr. CHENEY.—You keep cutting him off each time.

Q. (By Mr. WINN.) Now, then, you consider, then, that this dock—let me see that map, he has got the distances—well, you see the distances he has got down would be as—you haven't seen our maps and measurements—then you want the Court to positively understand now that in taking in consideration all the room there is between your trap and the peninsula it is just as easy, I say, to go in there in all kinds of weather and all times of night and get out with a boat as it would be though you didn't have that addition put on your trap?

(Testimony of C. J. Alexander.)

A. Yes, I think so; I think just as easy because on account of that right angle course you would have to make there, the right angle turn in order to get out, the other way it would not be any safer than it would be to come out the way you went in.

Q. Suppose a man went in there with a tow, a boat the size of the "Anna Barron"?

A. A man has no business in there with a tow.

Q. Never did have even before the construction of that trap?

A. Never would with a tow in the position that would bring it between that reef and that trap because the tow isn't in position.

Q. I understand, Mr. Alexander, if your trap wasn't there and a boat went in with a tow that wouldn't be between your trap and the reef if the trap wasn't there?

A. No, that wouldn't be between the trap and the reef if the trap wasn't there?

Q. You say without the trap in there at all a boat would have no business in there with a tow?

A. Yes, sir, I say that.

Q. Now, do you want to say that without any trap there a man [471] could go in there with a tow and safely get out?

A. No, sir, a boat would have no business in there, it would be entirely out of position to go in there inside of it to anchor because no room in there to anchor a tow.

Q. Then, do I understand you to say this is no shelter at all in case of a north wind for boats of

(Testimony of C. J. Alexander.)

the size of the "Anna Barron" and other boats to go in there with a tow?

A. I said, we are not talking about boats at all; we are talking about safe places to go with a tow.

Q. Now, I will ask you, you have qualified as a steamboat-man, if you were going up there and struck such a head wind that required you to take shelter in there with a steamer like the "Anna Barron" with a tow of logs, would you consider it just as safe to go in there with a tow there now with the trap in as if it wasn't there?

A. I wouldn't consider going in under no circumstances with a tow of logs there with the trap there or without the trap, because going in there that close to the shore with a steamer of the size of the "Anna Barron" with a tow of logs—

Q. Well, let's see, Mr. Alexander, your trap extends fully out as far as the protected point?

A. No, it doesn't, it is shown—it is in that map but in reality it doesn't as you will see.

Q. You are sure of that?

A. We will bring evidence to show.

Q. I want to know what you think about it now.

A. Well, I think that the plat is incorrect in so far as the trap is shown to extend a greater distance from the shore than in reality it does, in relation to the points of the upland and the reef there. [472]

Q. Have you measured to ascertain as to whether or not that Hill's map so far as the trap being put on there is out of shape?

A. Yes, sir, the trap is either too long or the reef

(Testimony of C. J. Alexander.)

is too short one way or another; I don't know which it is.

Q. Now, let me understand—from this, Mr. Alexander, you know where your trap is? A. Yes, sir.

Q. You have fished it there? A. Yes, sir.

Q. And fished it for the Alaska Packers' Association? A. Yes, sir.

Q. And you know where that reef is?

A. Yes, sir.

Q. Now, I want to ascertain from you, Mr. Alexander, suppose you were drawing a line parallel to the upper line of Barron's claim down to a point down and across below, just below the end of your trap, as to whether or not that your trap wouldn't extend out further toward that line than either one of these other points? .No parallel to this?

A. I understand you, but I am taking some other observations that I am conversant with.

Q. Yes.

A. Well, the trap doesn't extend out as far in relation to that point in the reef as it is shown in that plat; no, sir.

Q. Well, then, the fault you find in that trap—with the map is that the trap is either too long or the point does not extend out far enough?

A. That is the idea. In that respect it is wrong, in that respect.

Q. Now, just—just in reality, in fact does your trap extend out [473] further than the point, or does the point extend out further than the trap?

A. The point extends out further than the trap.

(Testimony of C. J. Alexander.)

Q. You swear to that positively? A. Yes, sir.

Q. And when I say extends out further I mean extends out further towards a line that would be parallel to the upper side line of Barron's claim?

A. Well, I wouldn't swear to that because it is hard to carry out those parallels with the eye a distance away from the chart without an instrument to do it with, but I have made other observations with relation to the trap and the point which positively demonstrates that the plat is incorrect I wouldn't say that in reality the point does extend out further than the trap but it extends out further in relation to the trap than is shown there.

Q. Then, as a matter of fact, Mr. Alexander, you didn't think about extending the line of your trap any further than it was on the hearing of that preliminary motion until you had advice from your attorneys?

A. No, I did not think of it at the time of the restraining order; at the time the restraining order was served on me I did not consider extending it any further in at that time, didn't consider it possible to extend it further in at that time and—

Q. Now, you talked about some soundings there that Mr. Jennings questioned you concerning, and when did you make those soundings?

Mr. CHENEY.—We are going into those on our case, that would not be proper now.

Mr. WINN.—He asked about it. [474]

COURT.—You have gone into it, Mr. Cheney.

Mr. CHENEY.—But he asked him about these

(Testimony of C. J. Alexander.)

soundings on this map and he didn't know anything about them.

COURT.—Mr. Jennings asked him about that whole front.

A. I know. I can get at the date of these soundings, Mr. Winn.

Q. (By Mr. WINN.) Well, approximately, I don't care about the exact date.

A. Well, it has been recently; it was—

Mr. CHENEY.—We would have to get our map and soundings on there. We expect to do that.

A. Its date, Mr. Winn, well, I have in my time-book showing the time that this engineer was on that work and I think how many—

Q. (By Mr. WINN.) It was within the last week or two?

A. Within the last two or three weeks.

Mr. CHENEY.—I don't think it is fair to this witness and I don't believe it is competent for counsel to ask the witness about a map which shows these soundings which he helped our surveyor to make there and dispute him. If you want the map in we will get the map and put him on.

COURT.—Yes, the witness—if the witness says he can't remember then I can pass on it. Counsel is only asking him as to what he recalls of those measurements.

A. I have testified to that, Mr. Winn, I think that—I could not remember that, my recollection is not clear on the dates we made those soundings.

Q. (By Mr. WINN.) I am not asking about the

(Testimony of C. J. Alexander.)

dates, Mr. Alexander. I am asking you just concerning the testimony Mr. Jennings asked you, you told Mr. Jennings you had made soundings all along over here and how you found the bottom etc.? [475]

A. Yes, sir.

Q. Well, approximately, when was it you made those soundings?

A. Well, I have sounded—sounded that thing thoroughly in the year 1907, I sounded again the year 1909, I sounded again for the purpose of locating this trap which I have there now in the month of January, 1911, and I have taken careful soundings and observations there a great many times this summer in a great many different directions to ascertain if I could improve the condition of this fish-trap.

Q. Yes. Then you have been sounding the bottom over this period of time, but you didn't know that you could drive any piles in further in toward the shore on your lead line until Mr. Cheney told you that you had a right to do that and that was sometime last summer?

A. I discovered that, yes, sir; discovered that after that Mr. Cheney had given me this advice that there was nothing to prevent me from driving these piles there.

Q. Now, you had been sounding there a whole lot before that but you didn't ascertain that was a good driving ground up to that time?

A. The soundings, if you please, gives you no indication of the surface of the ocean under it.

Q. How long have you been, Mr. Alexander—

(Testimony of C. J. Alexander.)

didn't you drive that trap for the Alaska Packers' Association? A. Yes, sir, but—

Q. Wait a minute— A. Yes, sir.

Q. And you say you drove that trap for the Alaska Packers' Association right along from the same line as it now is, didn't you?

A. As near as could, in my judgment, yes, sir.
[476]

Q. And then, when you did put your trap in there last year you knew from having driven the Alaska Packers' Association's that you could drive it in further, didn't you?

A. My trap as I have it stands now I have testified and will testify again, the row of pilings and the lead line extend two hundred feet or more further or nearer to the shore than the trap I had there for the Alaska Packers.

Q. I thought you testified a while ago, Mr. Alexander, that when you went to Cheney here, when Cheney told you you had a right to drive out there because you owned the upland just as much as Barron, I thought you testified you went to work and found some stumps of old piles there and that led you to believe you could get in and drive it there?

A. You misconstrued my answer, Mr. Winn.

Q. Let me understand, then, your trap as it is now constructed wasn't constructed just as the Alaska Packers' Association's?

A. It is practically covering the same ground other than a little more is extended nearer the shore by two hundred feet because as I explained as I have

(Testimony of C. J. Alexander.)

discovered since the lead line is setting perhaps fifteen or twenty feet further to the eastward than Alaska Packers' trap was and I think it is in shallower water on the outside; that is that the Packers' trap was driven out further into deep water on account of having longer piles to construct it so.

Q. I see; then your lead is closer in shore than the Alaska Packers'?

A. It is closer yes, sir, by two hundred feet or more.

Q. Now, when you drove that for the Alaska Packers' Association you didn't ascertain as to whether or not you could get in any closer to the shore?

A. Yes, sir, for the Alaska Packers' Association I drove in until [477] the piles fell down with me, couldn't stand the pile up, couldn't drive one in the bottom that would stand.

Q. And you drove those along the lead line as you have it now?

A. Just on a line probably fifteen to twenty feet further to the westward.

Q. Well, the fifteen or twenty feet to the westward you couldn't get that pile to stand for the Alaska Packers' Association?

A. I couldn't ever get in this direction, that is I couldn't—

Q. In how far?

A. Couldn't get them in as I have explained within two hundred feet or more as far as I am with this line now as near the shore.

(Testimony of C. J. Alexander.)

Q. Well, now, didn't you testify on that preliminary hearing, Mr. Alexander, that you had sounded all around within a thousand feet of your trap here and had found it all good ground to drive in?

A. Yes, sir, I verify it.

Q. Yes. A. Yes, sir.

Q. Well, now, I will put it within that thousand feet on either side of that trap, you failed to drive piles for the Alaska Packers, that is, you drove them down to such an extent that they couldn't go down any farther—they broke off?

A. My evidence was that I was able to drive along that back anywhere within a radius of one thousand feet, piling an equal distance almost anywhere along after you got out some distance from the shore, three or four hundred feet, maybe the evidence will show, I don't remember just what it was, but it was about that distance anyhow.

Q. After you got out three or four hundred feet from shore what do you mean by the shore line, ordinary high tide or what? [478]

A. I mean after you get out three or four hundred feet from the ordinary line of low tide you are able to drive piling or may drive a wharf out to withstand the action of the tidal currents of the sea there, could anywhere all along the face of that claim there for a thousand feet along the shore which I spoke of.

Q. Then, that would mean if you get two or three hundred feet down from this line of low tide which would throw you down pretty nearly along "Barron's piles"? A. Yes, sir.

(Testimony of C. J. Alexander.)

Q. And then along in here?

A. Anywhere along there.

Q. You found you could drive piling in there?

A. Yes, sir.

Q. But this discovery that you could drive piles further up towards Barron's property that was discovered later than this? A. Yes, sir.

Mr. WINN.—That is all.

COURT.—That is all.

Recross-examination.

Q. (By Mr. CHENEY.) Mr. Alexander, I just want to ask one question. At the time you talked that matter over with me after the injunction was refused in this case you remember me stating to you that Mr. Barron hadn't even filed an application for patent in the Land Office?

A. Yes.

Mr. WINN.—I object to it as incompetent, irrelevant and immaterial. [479]

COURT.—It isn't material.

Mr. CHENEY.—He stated his reason; I thought I had the right. That is all.

COURT.—That is all. Any other witnesses, Judge Winn?

Whereupon plaintiff rested his case in chief.

Mr. JENNINGS.—Comes now the defendant in the above-entitled cause, plaintiff having announced that he would rest his case, and moves the Court to make and enter a decree in this case dismissing this bill, for the reason that the evidence offered in support thereof fails to reveal any legal or equitable

ground which would justify the granting of the prayer for an injunction or the awarding of any relief whatsoever to the plaintiff.

I will just state briefly the grounds of the motion, if the Court please. The testimony in this case has shown, it seems to me, quite conclusively that this—this alleged harbor or that the locus of this—of this fish-trap is only valuable for three things: One is as a mooring ground, a place, a harbor of refuge for vessels in case of strong northerly winds blowing. Second, as a fish-trap site. Third, as a—as a place upon which the defendant—as a place in which the defendant desires to erect a cabin for the purpose of housing a watchman—the plaintiff I mean, the plaintiff desires to build a cabin for the purpose of housing a watchman to watch its fish-traps—his fish-trap. Fourth, that the plaintiff desires to establish a place wherein he may store gasoline, distillate or naphtha.

Now, the testimony shows, if the Court please—I won't say the testimony—but claim rather—if the foundation of this injunction—this injunction that is sought by plaintiff, that this is a good mooring ground and that by virtue of the fish-trap the defendant destroys his mooring ground, then it is alleged in substance that it is a menace to navigation. In other words, that [480] he interferes with the navigation there—navigation of Chatham Straits, and that being so, if that is the only ground, why it wouldn't—the action couldn't be brought by Mr. Barron, has to be brought by the United States on the relation of Barron, or has to be brought by the District Attorney, or there would have to be some complaint that it is

a menace to navigation, some complaint by somebody else except just Mr. Barron himself. Second, I contend that if the injunction sought be referable to the fact that Mr. Barron wants to build a fish-trap, that the ownership of the uplands conveys no rights upon him to build a fish-trap any more than anybody else and that he has no right that we have invaded by building our fish-trap, so far as his desire, it is his desire to build a fish-trap is concerned. And it seems to me that the evidence that he intends to use or wants to use it for anything else is inconsequential. The idea that he wants it for a place to store some distillate or naphtha for gasoline launches when it is five miles from his headquarters and five miles from the place where he keeps his boats is, to my mind, very fishy.

But not only that, if the Court please, but the evidence in the case shows that, if that is his object, then his access, his ingress and egress, to his upland is not cut off because the testimony shows that he could build a wharf right out joining on to the fish-trap, and that is a complete and feasible and satisfactory access and egress—access to and egress from his upland. And I don't see what equity has been shown in this case.

COURT.—Well, I might say, Mr. Jennings, in a matter of this kind, regardless of what the Court may think of the evidence as to its sufficiency, and, of course, I am not prepared to say at this time, yet even if it were doubtful as to whether a case had been made, my judgment would be in [481] an equity case the Court ought to hear the case out, then there

is only one appeal.

Mr. JENNINGS.—I just made the motion for the sake of the record.

COURT.—If the Court should take the motion seriously and nonsuit the plaintiff at this time, if the Court appeared to be in error it would require a remand to this court and a subsequent trial, and for that reason I do not think it is necessary for the Court to hear argument on either side because I am satisfied that the Court would not, in the view I take of the case, sustain the motion at this time. The motion may be overruled.

Mr. JENNINGS.—We except, your Honor.

COURT.—Yes.

Mr. CHENEY.—Call Captain Rowe. [482]

[Testimony of J. G. Rowe, for Defendant.]

J. G. ROWE, being duly called and sworn, testified as follows on behalf of the defendant:

Direct Examination.

Q. (By Mr. CHENEY.) Captain, state your name to the Reporter there, will you?

A. J. G. Rowe.

Q. What is your age, Captain? A. Age 53.

Q. You are a sea-faring man? A. Yes, sir.

Q. How long have you been a sea-faring man?

A. As long as I can remember; almost all my life. I was a very small boy when I started.

Q. From what coast? A. On the Maine coast.

Q. On the Maine coast. Have you been engaged in—well, I will ask you what business you have been engaged in in Alaska? A. Fishing.

(Testimony of J. G. Rowe.)

Q. What boat, if any, do you run now in connection with the fish business?

A. The "Anita Phillips."

Q. I will ask you whether or not you have had any experience in the conduct of your business along the shore of Admiralty Island, from Point Retreat down towards Hawk Inlet, in that section of the country?

A. Yes, sir; fished there—well, I am familiar. I fished up and down there every year for ten years.

Q. Ten years?

A. Not steady, you know, may be there one week, then might go some place else, but off and on during the season always [483] go there a few trips every season and fish that shore.

Q. Are you acquainted with the little cove down below Funter Bay on the shore of Admiralty Island where Mr. Alexander has a fish-trap?

A. Yes, sir.

Q. How long have you known of that cove—about how many years?

A. Well, ever since I have been fishing; about ten years.

Q. About ten years? A. All of ten years.

Q. Now, Captain, in your experience of ten years on that coast I will ask you whether or not you consider that cove a safe harbor? A. No, sir.

Mr. WINN.—Wait—we want to object to it as incompetent, irrelevant and immaterial for any purpose in the case, just to save the record, your Honor. The question, your Honor, is—I might indicate to you—is not that whether or not this is a place for

(Testimony of J. G. Rowe.)

landing steamers and a harbor generally, but I apprehend that if I should own a piece of land that abutted on navigable water and it was so precipitous down to the water that it was impossible to reach the water at all and it dropped off immediately for three or four hundred feet, then, if I come in and complain to the Court that somebody is cutting my access off to deep water there might be some question, that is, as to whether or not that by nature I could reach my upland anyway. Now, the question as to whether or not the captain considers this a safe harbor or it is a harbor generally for traffic, generally for navigation purposes, I don't think it is material in this case at all. I state candidly to your Honor that our main object in showing that and our only object was to show that [484] if unobstructed in front of our property that by nature we could reach it. Now, when it comes down to the question of the quality of this harbor and so forth, I don't think that question, your Honor, is material in the case at all.

COURT.—I don't think it is material in the case myself, Judge Winn. I didn't think it was material when offered by you.

Mr. WINN.—It was only to show by nature we are entitled to the privilege if we desire to exercise it. If, for instance, a piece of land if a mountain or so precipitous that where it abuts on the water that the water immediately dropped off several hundred feet and then we wanted access to get back and forth, then the question would come: Can you ever get there any way?

(Testimony of J. G. Rowe.)

COURT.—That is just the view I take of it exactly.

Mr. WINN.—And it was to show that we had by nature an access there to get in and on. I don't think the question of the quality of the harbor is material.

COURT.—If that is the view of the case you have, then it must necessarily follow that you must prove that you want to use it at this time for some specific purpose, for the man who has a precipitous bluff, if he has any rights there, has just the same as if you have a good harbor. So I take the same view as you do; that is the view I took from the commencement of the case; that is the reason I don't think any of this evidence is material. I think it is a practical question entirely and not a theoretical one, and I think it is just as you have stated. I think you have put the case very clearly and very fairly; that if a man owns a precipitous bluff along by the sea or abutting on navigable water in the nature of things he has no use for littoral rights and [485] if that is true, then it follows that, even the man that has the good harbor if he has no use for it, unless he is going to put it to some use, that he can't complain; that is the reason I think that this evidence was incompetent. It was immaterial for you and I think it is immaterial for the defendant.

Mr. WINN.—Of course, I don't consider the same side of it.

COURT.—I know.

Mr. WINN.—The question is to show that we had a place there that is good for our purposes of access

(Testimony of J. G. Rowe.)

for practical reasons. Now, he is going into the public harbor purposes.

Mr. CHENEY.—I am simply answering the testimony of Captain Thornton—this was a good harbor for a west wind, northwest and northeasterly wind. If he was allowed to do that, wouldn't be fair to cut us off.

COURT.—But counsel now says that the only reason he offered that evidence was to show that the harbor is such as to enable him to have practical access to the harbor.

Mr. WINN.—Now, whether Captain Rowe could use it or has been using it or any other fisherman has been using it. If we have been using it as making our ingress or egress for whatever purposes we want to use it, then I think it is material. Now, coming into the public harbor purposes, I have no particular objection except to say that is outside the testimony, that we haven't gone into anyone else's using it at all.

COURT.—I think it will unnecessarily prolong the case, gentlemen. If you say it is going to be an important matter before the Appellate Court, in that case it should go in. I don't want to exclude testimony, but I will tell you frankly now, so far as I am concerned, it can have no influence [486] with me, in accordance with the view I take of the case.

Mr. CHENEY.—Well, your Honor, it wouldn't take over three minutes this testimony. I am not going to ask him anything except in rebuttal of the testimony of Captain Thornton.

(Testimony of J. G. Rowe.)

COURT.—You object to it, Judge Winn?

Mr. WINN.—Oh, no, if he wants to testify. Go ahead.

COURT.—Make it as short as possible, gentlemen. It is just adding to the record and making it more expensive for whoever has to use it hereafter.

Q. (By Mr. CHENEY.) Well, I will ask you the question again, Captain. Do you consider that little cove a safe harbor, a safe protection for vessels, and if in any kind of a wind? Just state to the Court what your opinion of that is.

A. No harbor at all; it don't make anything like that a harbor; there is no harbor or other safe place between Funter Bay and Hawk Inlet, and Funter Bay and Point Retreat, and there is no safe place for no boat to anchor, no matter whether small or large, unless you take her up on the beach. Now, I have anchored in that cove in all kinds of wind. We fished there just below that trap. So far as being a harbor for us, when we get bad weather either have to go to Hawk Inlet or Funter Bay to weather it. We never think it is safe to anchor along that beach. The wind that comes from the west, southwest and southeast come up the straits. I call down east and west and northwest, that is the wind the fishermen never use—the northwest that comes down the straits and if it don't come too hard you can anchor there, but if it does it is something like Sheep Creek, you know. You can anchor by tying to a tree and hanging on. The wind coming up fifty or sixty miles, comes out of Icy Straits from the southwest

(Testimony of J. G. Rowe.)

or west, has got a considerable [487] play across that straits and that way without place from Hawk Inlet to Funter Bay and no harbor there; because the fishing boats carries the anchor on the bow. We have an anchor and chain and that weighs 450 pounds and we are supposed to anchor in that place and along that shore there is no safe anchorage for nothing except at Funter Bay and Hawk Inlet for nothing anywhere along that shore.

Q. Now, Captain, I show you a Geodetic Survey chart.

Mr. JENNINGS.—What exhibit is it, Mr. Cheney?

Mr. CHENEY.—If the Court please, there is some red rings around here and I will, when Mr. Birkinbine takes the stand, I will have him testify to those. It is simply made for the purpose of showing the distance.

COURT.—You can mark it for identification now.

Mr. CHENEY.—Very well. I will have this marked Defendant's Exhibit 3 for identification.

Q. Now, Captain, if you will just look at this Defendant's Exhibit 3 for identification?

A. Here is southwest and east. Winds can come right in here, according to this—this is down towards Killisnoo. It can come—get a clear sweep, isn't a thing to stop it from coming clear down below Killisnoo, right to the waters of this—this bight in here. Well, in here is a bight like just inside of this there that is a bight.

Q. You mean on which side of Alexander's trap?

(Testimony of J. G. Rowe.)

A. Down by the southward shore by the compass.

Q. Southward or eastward?

A. Southward or eastward—you come in this way down from Port Killisnoo.

COURT.—You have got to speak louder.

A. We come in from southward or eastward to anchor. [488]

Q. (By Mr. CHENEY.) Yes?

A. The water is deep on this side there above where the trap is—is a kind of rocky-like reef and a big kelp bunch to the south and we come in from the south'ard.

Q. If this cove has any protection at all from any wind, which wind would it be?

A. Northwest wind coming down the Straits. I can't tell you exactly the course because I haven't got the parallel located here, but we steer by her compass; our course always going up the Straits on a northwest wind coming down—

Q. Or north wind?

A. Well, the only wind that would be any protection on this shore would be a northeaster, what I call a northeaster; that is the only protection there is. There is some protection there for a wind coming down the Straits; you can get well under the shore and anchor there, then take a line and run up to a tree and then you can hang on.

Q. But no protection for any other wind coming out of Icy Straits or up Chatham Straits?

A. No protection whatever.

Q. Now, I will ask you, I don't know, are you—

(Testimony of J. G. Rowe.)

are you somewhat familiar with—with the upland in shore from Alexander's trap—you have been there since that trap was built?

A. Yes, sir, I was there the first year it was built.

Q. Now, if you were coming in there, Captain, to anchor, which side of that trap do you consider the best place to go in, that is the east side of the trap or would you—southward face or the west side?

A. The east side. Come in from the east side because a big kelp bunch—big kelp bunch and rocks the other way, just above the trap—the trap—there is a big rock pile and kelp bunch; and [489] the water is deeper and you come because you get close to the shore until you get in—you go in that way and anchor.

Mr. CHENEY.—That is all, Captain.

COURT.—Cross-examination.

Cross-examination.

Q. (By Mr. WINN.) Well, Captain, that water is such there you can go in there and anchor and can reach the upland around that little harbor, can you not? A. No harbor there.

Q. But you talk about anchoring?

A. You can anchor, yes, sir.

Q. You have anchored in there?

A. We anchored.

Q. Now, then, there is not—there isn't any question but what if that trap was out of there a man could run his boat in there and anchor and get to the upland any time with any sort of a sea or in storm?

(Testimony of J. G. Rowe.)

A. I can get in there with the trap in there, the trap isn't in the way.

Q. Even with the trap in there it is good enough to go in and anchor and get to the upland?

A. Yes.

Q. Under any circumstances you can get to the upland?

A. If you have got good weather, but the trap isn't in the way.

Q. Now, when did you see that trap last, Captain?

A. Let's see; O, sometime this winter; I can't keep the date because we go back and forth; I was there last fall and last summer two or three times and I anchored in there this winter; laid there an hour or two and went deer hunting. [490]

Q. What time in the winter?

A. I don't remember.

Q. Before Christmas? A. N6, after Christmas.

Q. This last Christmas?

A. Laid there a couple of hours.

Q. The trap was there pretty nearly completed at that time?

A. Piles there; I don't know whether the whole trap was there; never took no notice of the trap; don't interest me.

Q. Now, Captain, if that was such a stormy, bad place the trap would not have stayed there all winter?

A. Why not?

Q. I am asking you the question.

A. They have got a trap over on Kake or Swanson's Harbor that is Mr.—— put it there; I think

(Testimony of J. G. Rowe.)

he has got that three years old and it is there yet, the biggest part of it.

Q. Notwithstanding this isn't a harbor, Captain, a boat could come in there in ordinary weather and anchor and get to the upland, isn't that true?

A. If it is good weather you can get to the upland now and anywhere along the beach, don't have to go in that cove, any time the weather is good, but when there is wind from the west or southeast, or southeaster, we call it, just as we call a northeast a northeaster, coming up the Straits it is impossible to lay there, impossible to land there.

Q. What about a north wind? A. A norther?

Q. Is it in any wise protected from a north wind?

A. Yes, it is protected some from a norther, if it is a very hard norther, very hard, and want to go in there you put your anchor out, have to run a line ashore, then to let your boat— [491]

Q. You have to go up pretty close in the cove?

A. No, don't get in the cove—this point of the cove here the water is deeper.

Q. (By Mr. CHENEY.) Which direction?

A. That is the southward.

Q. (By Mr. WINN.) Then, you contend that the principal anchoring ground is on the right-hand side of the trap as you go in? A. Right-hand side.

Q. That is the principal way?

A. I don't know which is the principal way. According to which way you go in.

Q. When you go in the right-hand side is always your right-hand side?

(Testimony of J. G. Rowe.)

A. Well, it is to the southward, it is to the southward.

Q. Well, let me ask you a question.

A. The principal way you go in there is to the southward or to the southeast.

Q. Which side of the trap do you go there to anchor? A. Leave the trap on your port hand.

Q. Which? A. On the port hand.

Q. That is where you always went in to anchor?

A. That is where I have been in to anchor.

Q. Now, Captain, let me ask you where did Alexander keep his scows and his boats?

A. Never see any scows laying there, only a scow and a little bit of a scow, that was the only boats I have saw there.

Q. Was you there when he was fishing?

A. Yes, sir, got bait. [492]

Q. Did you ever see him with any scows left to tow for his boats?

A. I saw men going in with a boat and I have been at that trap with a boat.

Q. Did you see him laying there overnight?

A. No, sir.

Q. You did state to the Court, Captain, if Alexander had any boats in there he always put them on the port side of his trap? A. The port?

Q. Yes, sir.

A. I didn't see Alexander have any boats in there; I have seen the scows, trap scows.

Q. Well, did you ever see any of those scows anchored on the port side of his trap, as you went in?

(Testimony of J. G. Rowe.)

A. No, I don't know whether I have or not.

Q. Did you ever see them anchored in there?

A. No, see them made fast to the trap.

Q. How many times were you in there after Alexander built that trap? A. I don't know.

Q. How many times,—can you tell?

A. No, I can't.

Q. No?

A. I don't keep no record, I don't keep no record of how many times I anchor along the beach.

Q. In all, how many times?

A. I don't know, a good many times, but I don't know how many.

Q. Were you fishing for Alexander?

A. No, sir, I was not fishing for Alexander.

Q. What were you doing there?

A. Fishing—halibut fishing. [493]

Q. You went in there to anchor?

A. We went in while cleaning too.

Q. And whenever you wanted to stop for rest or a night you went in there and anchored?

A. No, sir.

Q. What were you doing?

A. Fishing, I told you.

Q. Fishing?

A. Fishing, laying there, we anchored, cleaned our fish. If the weather is good we run in close to the shore and lay somewhere most anywhere sometimes.

Q. You have never been in there a time yet but what you could go in and reach the upland on either side and get around Alexander's trap all right when-

(Testimony of J. G. Rowe.)

ever you was in there?

A. I have been in there when you couldn't stay a half hour.

Q. Well, then, you didn't get in?

A. I got in the harbor, yes, could get in the harbor.

Q. What did you do when you got in? A. What?

Q. What did you do when you got in?

A. Anchored there hung on, in a northwester, and hung on.

Q. Well, if that wasn't any better place than any other places what did you go in there for?

A. Because didn't want to go to Hawk's Inlet, that is, five or six miles out of the way, with a load of fish.

Redirect Examination.

Q. (By Mr. JENNINGS.) Just one question in order to get it in the record. In going in there, whether you would go to the right or the left of the trap to anchor there—you said you would go to the port?

A. I would leave the trap on my port hand. [494]

Q. What does that mean—just call it right or left?

A. Just the same as this way: the trap was over there and then I was going in this way and I left that trap on the port hand.

Q. You left the trap on your left-hand side?

A. Left hand or port side.

Recross-examination.

Q. (By Mr. WINN.) What size boat is the "Anita Phillips"?

A. About twenty-two or twenty-one tons.

Q. What is the length of her?

(Testimony of J. G. Rowe.)

A. Fifty-eight feet.

Q. What water does she draw?

A. What do you mean, loaded or light?

Q. Well, loaded?

A. About seven and a half feet.

Q. And light? A. About five.

Q. Have you seen any steamers go into that place?

A. No, sir, never seen a boat anchored in there with an anchor down except the "Phillips" and the "Caesar."

Q. The "Caesar"? What size boat is the "Caesar"?

A. The "Caesar," she is, I think she is forty-two or three feet, I have forgotten it exactly.

Q. What does she draw?

A. About seven feet of water.

Q. Both gasoline boats?

A. Both gasoline boats.

Q. Never see Barron's boat in there, the "Anna Barron"? A. No, sir.

Q. Never see the "Georgia"? [495] A. No, sir.

Q. Ever seen the "Buster" in there?

A. No, sir.

Q. These boats you have just mentioned are the only ones you ever saw?

A. They were the ones, I was in myself and took them in there.

Mr. WINN.—That is all.

COURT.—Call your next witness, gentlemen.

Mr. CHENEY.—I will call Captain Magill.
[496]

[Testimony of J. H. Magill, for Defendant.]

J. H. MAGILL, being duly called and sworn, testifies as follows on behalf of defendant.

Direct Examination.

Q. (By Mr. CHENEY.) What business are you engaged in, Mr. Magill?

A. In the steamboat business.

Q. What boat do you run?

A. I own the steamer "Peerless."

Q. Are you familiar with the coast of Admiralty Island along Chatham Straits? A. Yes, sir.

Q. Are you acquainted with the place—with this little cove that has been testified to here by Captain Rowe? A. I am.

Q. What did you say? A. I am.

Q. Yes. Have you ever been down there in that cove? A. Yes, sir.

Q. How many—several times or how many times?

A. Been there several times.

Q. Yes, and you have fished around this country for how many years?

A. Well, I have operated that boat around this country for the last six years.

Q. Both fishing and towing logs? A. Yes, sir.

Q. And piles? A. Yes, sir.

Q. Now, I will ask are you familiar with the location of Alexander's fish-trap in that cove?
[497] A. Yes, sir.

Q. I will ask you this question, Mr. Magill, if you were going into that cove to anchor, would you go in on the right side, that is, on the eastward side of the

(Testimony of J. H. Magill.)

Alexander trap as it—as it is located there or would you go in up to the bight on the westward side?

A. Why, there isn't room to anchor in the bight on the westward side; I would go in on the south-eastward side.

Q. You call that the south, Mr. Magill, but it is really—it is really more east, that is the shore?

A. Well, I don't know just the trend—the general trend of the shore is north and south or nearly so.

Q. Yes.

A. But that is right along there, I guess the trend lays northeast—northwest and southeast.

Q. Is the water—is the water there deeper and is there better holding ground on the east side? Is that the reason you go on the east side?

Mr. WINN.—I object to the question; unless he confines these questions as to whether he is going in there for the purpose of reaching Barron's upland, it is absolutely immaterial, the access or ingress or egress to and from Barron's claim. We don't care about the other part.

COURT.—It is indefinite, Mr. Cheney.

Mr. CHENEY.—Very well, I will withdraw it.

Q. Captain, if you were going in there to land—are you familiar in a general way with the—with the location there that upland, is it not upland?

A. I am not familiar; I see a location notice on the shore one time; I don't know whether a homestead or what it was.

Q. You know where that piece of land is? [498]

A. Yes, sir.

(Testimony of J. H. Magill.)

Q. You say you don't know whether it is a home-
stead or what it is; well, I will ask you, if you were
going in there and wanted to land on some part of
that—of that location—that ground that is contained
in the location there, and you could go to any part
you wanted to, but if you just wanted to reach the
upland, for instance, and land some passengers or
freight, which end of the claim would you go on, the
westward or the eastern end of it over near this?

Mr. WINN.—Wait till he gets through with the
question. We object to the question as incompetent,
irrelevant and immaterial; there is no foundation
laid for him to answer; he has not shown that this
man has any papers to navigate, any papers of any
sort; and it is not shown, if the Court please, that he
knows anything about the waterfront of Mr. Bar-
ron's claim.

Mr. CHENEY.—Now, if the Court please, I asked
the question and counsel objected to it; I asked him
then another question and he objected to it and I
made the question to suit Judge Winn.

COURT.—He may answer.

Mr. WINN.—It is only the qualification, your
Honor.

COURT.—Well, he says he is operating a steam-
boat.

Mr. WINN.—I don't know; he hasn't master's
papers, maybe an engineer.

Mr. CHENEY.—Don't make any difference
whether he runs it or owns the boat.

COURT.—He may answer; you may bring out on

(Testimony of J. H. Magill.)

cross-examination the qualifications of the witness.

Q. (By Mr. CHENEY.) You understand the question? [499]

A. I have forgotten it just now; state it again.

Q. Well, if you were going in there and wanted to reach the upland of this claim of Mr. Barron's, which extends, I will say, eight hundred feet in length along that shore, immediately above Alexander's trap, that is, the trap, we will say, is about middle of the claim of Mr. Barron's and you wanted to land there somewhere on that shore, where would be the feasible and best place where you would land?

Mr. WINN.—Now, wait; we object to the question, incompetent, irrelevant and immaterial, and no proper foundation laid, and has not proved himself competent to testify on the matter; and furthermore, it is confining the question not to the circumstances about the trap but in there south of it.

COURT.—Let him answer; you may ask him later on.

A. Well, the stuff we did land there we anchored down five or six hundred feet below the trap. I landed all of Mr. Alexander's stuff there when the weather was so that we could, and we landed anyway three to five hundred feet from the trap.

Mr. CHENEY.—Where is that map? I have another, if counsel won't object, just for the purpose of this question.

COURT.—It would be simpler, Mr. Cheney, if you first offered your surveyor, if you have one, as a witness. He could lay the foundation and the other

(Testimony of J. H. Magill.)

witnesses could refer to it.

Mr. CHENEY.—Yes, I intended to do it, but Captain Rowe wanted to get away and I thought perhaps Captain Magill would, too.

Mr. JENNINGS.—Just ask Mr. Magill to step aside and call Mr. Birkinbine. [500]

Q. (By Mr. CHENEY.) Which side of the trap do you mean, Captain Magill, when you say below; you state you went in below the trap?

A. I mean on the—

Mr. WINN.—Same objection, your Honor. I want to take an exception to the ruling.

COURT.—Same ruling.

A. I mean on the southeast side of the trap and have the trap on your left-hand side going in.

Q. (By Mr. CHENEY.) You would go in on the side toward Hawk Inlet, toward the trap?

A. Yes, sir.

Q. Well, you said when you did land there, you generally, to do this work you were speaking of, you landed three or four hundred feet to the east or southeast of the trap towards Hawk Inlet?

A. Yes, sir.

Mr. BURTON.—He didn't so testify, six hundred feet.

Mr. CHENEY.—He testified to that and also to the other. Now, I will ask you to look at the map. That is all.

Cross-examination.

Q. (By Mr. WINN.) Mr. Magill, what steamers have you ever navigated in Southeastern Alaska?

(Testimony of J. H. Magill.)

A. I have never navigated any steamer.

Q. You have never navigated any steamer?

A. No, sir.

Q. You don't hold any master's papers or pilot's papers? A. No, sir.

Q. Who did you have as master of your steamer when you went [501] in there, Mr. Magill?

A. I think Mr. Hunter.

Q. Mr. Earl Hunter? A. Yes, sir.

Q. You was never in there before Alexander put his fish-trap in there?

A. Well, I never was in there prior to that time; he was getting ready to put it there; I was there when he put it there.

Q. When he put the trap in. You don't know anything about the boundaries of Mr. Barron's upland piece of ground? A. No, sir.

Q. And when you went in there, Mr. Hunter being the master or captain of the boat landed in the manner in which you state? A. Yes, sir.

Q. And that was from three to six hundred feet in a southerly direction from the fish-trap?

A. Southeasterly.

Q. Southeasterly direction; how far did you go in towards the land?

A. Well, we anchored, I suppose, about halfway in behind this projection that projects out, behind the rocky point there.

Q. And how far were you from the land immediately in front of you at ordinary low tide or ordinary high tide, if you know?

(Testimony of J. H. Magill.)

A. Well, I suppose we was two hundred and fifty or three hundred feet.

Q. How far did you anchor from the lead—of the trap?

A. Well, from three to five hundred feet we would be from the lead; we did not get right on the same spot each time. [502]

Q. You never was in that place at all until Alexander commenced work there?

A. I was in there one time going north.

Q. Before Alexander commenced operations there?

A. Yes, sir.

Q. What was your occasion for going in there then?

A. Well, we was going up Chatham Straits in a heavy norther and kept along that shore to get the lea and we ran under that point as near as we could.

Q. The closer you got under that point the better protection it was from the north wind?

A. The wind didn't affect us but a heavy swell came in and we had to turn and go back to Hawk Inlet.

Q. But you did try to get shelter under that point?

A. We did.

Q. But you couldn't get shelter enough and you turned and went— A. Went back to Hawk Inlet.

Mr. WINN.—That is all.

Mr. CHENEY.—That is all.

COURT.—That is all. Mr. Cheney, call Mr. Birkinbine. [503]

[**Testimony of H. P. N. Birkinbine, for Defendant.**]

H. P. N. BIRKINBINE, being duly called and sworn, testified as follows on behalf of defendant:

Direct Examination.

Q. (By Mr. CHENEY.) State your name and place of residence.

A. H. P. Birkinbine; Haines, Alaska.

Q. What is your occupation?

A. Civil engineer.

Q. How long have you been a civil engineer?

A. Well, I am not a college graduate. I guess I came to it kind of gradually by practical experience.

Q. Well, how long have you been?

A. Well, I have been working, actually, it will be twelve years the 2d of next July. Previous to that during the summers—well, I suppose during the summers and vacations off and on I have worked since the time I was twelve years old at the same business.

Q. Was your father a surveyor?

A. Yes, sir; he was a hydraulic engineer.

Q. What is it?

A. He was a hydraulic engineer.

Q. State whether or not you are commissioned as a deputy mineral surveyor. A. Yes, sir.

Q. And a deputy United States land surveyor?

A. Yes, sir.

Q. Now, you had experience in surveying before you came to Alaska, I understand? A. Yes, sir.

Q. And you say since you was about twelve years of age?

A. Well, of course, that was since—that was kind

(Testimony of H. P. N. Birkinbine.)

of work in [504] the summers, during the Christmas vacations.

Q. Well, that is when you were a young boy?

A. Yes.

Q. You worked during the summer time but you say you worked steadily at it for about how many years?

A. It will be twelve years next July, that is general engineering.

Q. How long have you been working at the business in Alaska?

A. I came to Alaska—it will be four years next April.

Q. Have you been engaged in surveying during all that time you have been up in Alaska here?

A. Yes; that is general engineering. I came here on construction work.

Q. I want to ask the witness about something about a wharf later on, so I will ask his qualifications on that. Have you ever had any experience, Mr. Birkinbine, in the—in the construction of wharves?

A. Yes.

Q. Well, to a considerable extent, have you?

A. Well.

Q. Well, about how much experience have you had? Just state your experience in the construction of wharves. What you know about the construction, not all you know about it, but your experience?

A. The first place I ever had anything to do with wharves was on the Atlantic coast.

Q. Where?

(Testimony of H. P. N. Birkinbine.)

A. At Baltimore, Maryland, on tide water, connecting the shore in Maryland to tide water, that is.

Q. Anywhere else in the states?

A. Just behind Norfolk, Virginia, on the same kind of work, for the tide water and deep water railway. Of course, I have had some pile-driver experience in the east. While [505] it was on tide water, it was piling, tresselling a railroad in the Dismal Swamp of West Virginia and like a wharf. Took us two gets to get across.

Q. It was piling work?

A. Piling work in the Dismal Swamp of West Virginia and the Black Water Swamp of Virginia. I had some experience and had charge of making repairs to the wharf at Fort Seward, Alaska. Mr. Webster was in control on one instance, and another instance was repaired by our own control. About this time last year I had charge of the rebuilding of a wharf for the War Department at Fort Ward, Washington, on an island,—on an island just opposite Bremmerton.

Q. And you had charge of that work?

A. That is under the Construction Quartermaster; of course, I reported to him.

Q. And you had charge of the work at Fort Seward. Now, Mr. Birkinbine, I will ask you if you have ever visited the trap location or the fish-trap owned by Mr. Alexander in Chatham Straits, on Admiralty Island? A. Yes, sir.

Q. If so, when did you first do that?

(Testimony of H. P. N. Birkinbine.)

A. On March the 16th and 17th—I beg your pardon, on February 16th and 17th and on March the 12th.

Q. Of this year? A. Of this year.

Q. You were employed by Mr. Alexander to go out there and make a survey of the ground, were you, and also the homestead location of Mr. Barron?

A. I didn't run all the boundary lines of the homestead location of Mr. Barron.

Q. Well, enough to— [506]

US L 11 N 8-4

[Cor. 4]

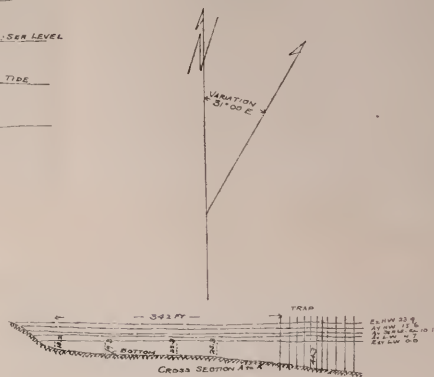
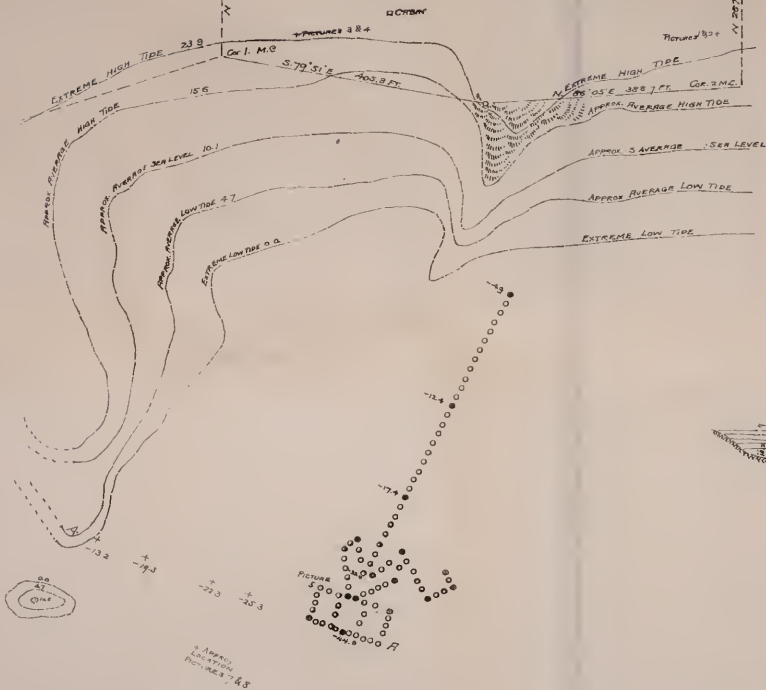
WEST 7007 FT.

Cor 3

U. S. Survey No. 804
S A HOMESTEAD CLAIM
V A. ROBERTSON

PLAT
OF
C. J. ALEXANDER
FISH TRAP NO. 1
AND
V. A. ROBERTSON
S. A. HOMESTEAD

Scale 100 Ft. = 1 in.
As Surveyed By
H. P. M. Beckenham
Feb'y 16 8 17. 1912.



Barron vs Alexander
Hutto et al
Rec'd in RR
En RR

Defto 4

+ APPROX
LOCATION
PICTURE 6

(Testimony of H. P. N. Birkinbine.)

A. To plat it.

Q. To plat it? A. Yes, sir.

Q. And to make a map of the vicinity there?

A. Yes, sir.

Q. Where the fish-trap is. I ask you if this is the map you made from your field-notes?

A. Yes, sir; that is the map I made.

Mr. CHENEY.—Now, I will ask that this be marked for identification. You can look at it, Judge Winn.

Mr. JENNINGS.—Don't need to mark it for identification.

COURT.—Offer it in evidence then?

Mr. CHENEY.—Yes; offer it in evidence.

COURT.—May be received.

Mr. WINN.—Well, we object to it, if your Honor please, until he testifies to the accuracy and so forth, and so on, but I do not know—I suppose it would go in then. Just some figures on it. Now, of course, if he explains them, be all right.

Q. (By Mr. CHENEY.) Was that map made by you from actual measurements taken on the ground and with your instruments and at the time you were there on February 17th?

A. February the 16th and 17th I made an actual survey of the ground and that is the result of my notes.

Q. That is a correct map so far as you are able to make one?

A. To the best of my knowledge and ability.

COURT.—It may be received in evidence.

(Testimony of H. P. N. Birkinbine.)

(Marked Defendant's Exhibit 4.)

Q. (By Mr. CHENEY.) I hand you Defendant's Exhibit 3 for identification and ask you to state what it is.

Mr. WINN.—I suppose it shows on its face what it is, if [508] a Government map.

Mr. CHENEY.—Something else he has put on there.

Mr. WINN.—But I want him to state it is a Government map. If a Government map, of course, it is admissible.

A. A Government navigation map by the Coast and Geodetic Survey of Lynn Canal and Stephens Passage, number 8300.

Q. (By Mr. CHENEY.) I will ask you if you made those circular lines?

A. Yes, sir; I did.

Q. There on that map?

A. The lines are made on a different radius of five miles there, that is 5, 10, 15, 20, 25 and 30 miles from the point, in order to show the distance that the wind would have in velocity in getting at that point—the structure.

Q. That is the object in drawing the circles?

A. That is the object; yes, sir.

Mr. CHENEY.—I offer this in evidence—just marked for identification.

WITNESS.—I will state, Mr. Cheney, that these miles are statute miles.

Q. (By Mr. CHENEY.) Well, what does this little cross represent, Mr. Birkinbine?

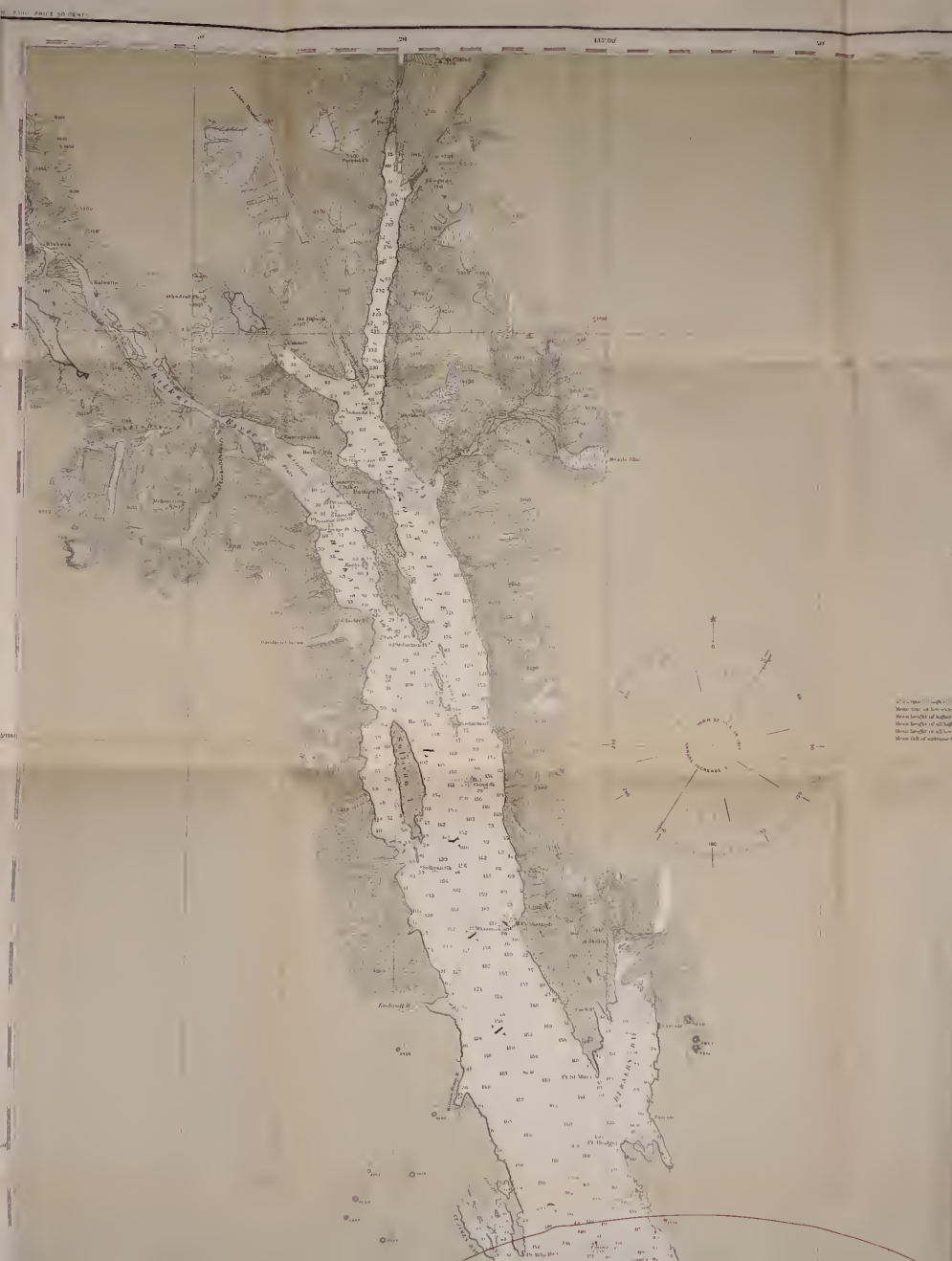
(Testimony of H. P. N. Birkinbine.)

A. That is the location of the fish-trap and the survey, which is also the center of all of the circles.

Mr. CHENEY.—I offer this in evidence.

COURT.—Any objection.

Mr. WINN.—Yes, object to it as incompetent, irrelevant and immaterial for any purpose whatever, burdening the record, so far as the testimony of the witness is concerned now absolutely immaterial, showing the velocity of the winds and other physical conditions and so on. I don't see, if your Honor please, that any need of it. [509]





LYNN CANAL AND STEPHENS PASSAGE

S. E. ALASKA

Scale 1:100,000

Reference Projection

Published at Washington, D. C.
June 1891
BY THE COAST AND GEODETIC SURVEY
of the Bureau of Navigation



Scale from 1:100,000 to 1:100,000. 1 inch = 10 miles. 1 inch = 10 miles. 1 inch = 10 miles.

Trigonometrical stations between 1880 and 1890
Topography between 1880 and 1890
Hydrography between 1880 and 1890
containing data derived by the U. S. Hydrographic Survey

TIDES

The low water of the tide is generally measured from the bench mark on the shore.

	Low Water	High Water	Mean	Range	Mean	Range	Mean	Range	Mean	Range
Mean water of low water after mean of tide gauge	6.55	6.25	6.25	6.25	6.25	6.25	6.25	6.25	6.25	6.25
Mean water of high water after mean of tide gauge	6.55	6.25	6.25	6.25	6.25	6.25	6.25	6.25	6.25	6.25
Mean height of all high waters above mean of tide gauge	10.1	10.1	10.1	10.1	10.1	10.1	10.1	10.1	10.1	10.1
Mean height of all low waters above mean of tide gauge	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1
Mean height of all high waters above mean of tide gauge	10.1	10.1	10.1	10.1	10.1	10.1	10.1	10.1	10.1	10.1
Mean height of all low waters above mean of tide gauge	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1

The predicted time and height of the tide can be obtained from the TIDE TABLES published annually by the Coast and Geodetic Survey.

NOTES

The soundings are in fathoms and in the depth of mean low water.

SHOALS AND OBSTRUCTIONS

At low water, the depth of the shoals is 10 fathoms.
At high water, the depth of the shoals is 10 fathoms.
At low water, the depth of the shoals is 10 fathoms.

At low water, the depth of the shoals is 10 fathoms.
At high water, the depth of the shoals is 10 fathoms.
At low water, the depth of the shoals is 10 fathoms.

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(Testimony of H. P. N. Birkinbine.)

COURT.—May be received.

(Defendant's Exhibit 3 received.)

Mr. WINN.—I will take an exception.

Q. (By Mr. CHENEY.) Now, Mr. Birkinbine, I don't know but what it would be lighter if you had that on the easel, be better light for the map. Now, Mr. Birkinbine, I will ask you to point out—to point out the lines of the survey—of the homestead, homestead survey number 804 of Mr. Barron's and explain to the Court the lines that you have drawn, referring to the different stages of the tide, in connection with this fish-trap and also the contour of the shore and the location of this reef and this point here, that is marked on the plaintiff's exhibit "bare rock," with reference to the location of the fish-trap. I am doing that, your Honor, to get along faster, not ask so many questions.

A. I first started by using—by intending to use the same meridian that was used by the official surveyor and which I suppose Mr. Hill used for his survey, as I thought that would put them all on the same base line, and I found this corner and this corner, and then from this corner I ran to here and I located—

Q. When you say "here" just state.

A. This corner No. 1—

Q. So the Reporter can get it.

A. I had better start over again. I started at meander corner No. 2 and ran to this intermediate meander over there which is on the rocky bluff, crossing the bluff, and then ran to meander corner No. 1, then reran the black lines there representing that

(Testimony of H. P. N. Birkinbine.)

part of the official survey which I ran over. These dotted lines I didn't run over; didn't see the necessity of running over them and my other work was all [511] laid out from these two front lines, and in locating the trap I only located what might be called the metes and bounds of the trap, that is a right triangle, otherwise solid black piles; the other piles were so scattered—then just the piles at the extreme ends of the lead and at the corners. The tide lines at zero, I have assumed to be extreme low tide, that is the June tide, and the extreme high tide is the upper lines which are simply represented as contours. I located, I think, it was twelve points around here with—I was using my instrument, using it first as a level and then triangulated to all these different twelve piles around here. Located this. It was approximately the same elevation that I have to approximate average high tide, and then from that and levels located the extreme high and from soundings I interpolated, locating the average sea level, the approximate average low tide and the extreme low tide. I then took soundings for the purpose of developing it—well, what might be called the mouth of this space between the rock reef and the trap, as I wanted to develop a cross-section across this mouth, if I can call it that, and these soundings were triangulated from these two points, right from these two points. First, this was located and this point was located, then this point.

Q. Now, when you say this point, this point where?

A. First, I located from corner No. 1 at the intermediate meander point the two outer corners of the

(Testimony of H. P. N. Birkinbine.)

trap. Then, I located this point marked by a dot with an "A" from these same two points by reading the boat from which the soundings were taken kept on the line or face of the trap and when they would take a sounding the angles were turned towards the position of the soundings; then the time that these [512] soundings were taken, that is, I think it took something like fifteen minutes to take the soundings and I assume in a good deal of this fifteen minutes I figured the height of the tide for that time, and then calculating what you were below extreme low tide and that gives then the soundings below extreme low tide for the mouth of that space going in between the reef and the trap.

Q. What do you—will you explain—how do you explain this here—you call this a cross-section, showing what, Mr. Birkinbine?

A. I call the cross-section showing the trap and the mouth of this space where you would take a boat to go in between the trap and this peninsula, suppose better name for it, and the cross-section represents how it would look if it were cut right down on the line where these soundings were taken.

Q. Now, I will ask you, Mr. Birkinbine, what is the depth of the water represented by these figures at the last lead pile inshore of Alexander's trap, as it now stands according to your map?

A. This is marked "minus 4.9" which means 4.9 feet below extreme low tide.

Q. That is the depth of the water as you found it at the last pile toward the shore of the trap?

(Testimony of H. P. N. Birkinbine.)

A. Yes, sir.

Q. As it was on that date? A. Yes, sir.

Q. (By the COURT.) That is the extreme low tide?

A. That is the extreme low tide; yes, sir. I have assumed extreme low tide to be zero.

Q. (By Mr. CHENEY.) Now, that—is that map made on the same [513] scale as Mr. Hill's map?

A. Yes; 100 feet to the inch. That is it?

Mr. HILL.—Yes, sir.

Q. (By Mr. CHENEY.) Now, if there is any difference in these two maps—I am not speaking of the tide lines now, but in respect to any other matters affecting the contour of the shore in front of this homestead or off here to the left where the "A" is marked and the—and the rock with the little circle in the center, please explain to the Court what the difference is between your map and Mr. Hill's?

A. Why, Mr. Hill, I think, shows the—a tide line about at this—about this line; that is the lowest one he shows is about what I call the average low tide.

Q. Just a moment. Let's get his map here so you can explain better.

A. Yes; we get a little different shape to the end of the reef here and we get a different position for this—for this that is called end of rock, "bare rock," which Mr. Hill calls it the end of the peninsula, and we get a little different position for the reef.

Q. Yes. Now, you heard Mr. Hill testify in relation to the map that he made, didn't you?

A. Yes, sir.

(Testimony of H. P. N. Birkinbine.)

Q. And you heard him state that this reef was located by him by triangulation and by the stadia measurement? A. Yes, sir.

Q. Now, I will ask you if you located this in the same way and placed it?

A. I didn't use my stadia. Now, in locating that reef I located it by triangulation, first.

Q. Yes. [514]

A. And then afterwards I measured the distance from this corner pile to this, the dot just right here on the highest part of this reef with a tape.

Q. What kind of a tape?

A. A steel tape. It is a little bit longer than my tape. It was—the measurement—was 421 feet.

Q. 421 what?

A. 421 feet was the distance to this dot right on the highest part of this reef, but it so happened that I had a 400 foot tape and we made it in one measurement by standing in a boat and continuing with another tape. We also measured from this corner pile to the dot beside "A" which —

Q. Just a moment. The corner pile on the eastward—on the westward side of the heart of the—

A. Southwest corner of—that is called the spiller of the trap, isn't it? I am not very familiar with the trap.

Q. Is it the pot or the spiller?

A. The pot is in the middle, Mr. Alexander?

Mr. ALEXANDER.—The pot.

A. We measured from a pile on the southwest corner of the spiller to the dot beside "A" and found

(Testimony of H. P. N. Birkinbine.)

that to be 385 feet. Of course, I could make it with one measurement with a 400 foot tape and then took the direction from one point to the other.

Q. (By Mr. CHENEY.) Now, you started to tell, Mr. Birkenbine, how it was that you measured this in addition to triangulating as Mr. Hill measured it. How else did you locate this at the spot that you have and why do you claim, if you do claim, that it is correct?

A. By my distance from here and my distance from here.

Q. Well, did you locate it any other way, by the sun or any [515] way?

A. Well, of course, I had a man with me and I though it would be in controversy and I called his attention to the fact that the highest part of this reef and the sun were in line with this, that is from the dot beside "A" to the dot on the reef and the sun meeting a line out where we stood at two o'clock in the afternoon. Of course, the sun is south at noon and travels toward the west and I wanted him to get the direction without me giving it to him.

Q. The man who was with you wasn't a surveyor?

A. No; I called his attention to the fact to notice the first direction of the reef.

Q. And the sun you say being south at twelve o'clock and this was at two o'clock, and at that time was that reef east or west of a line drawn towards the south from the point on that rock?

A. It was west.

Q. West. Mr. Alexander had called your atten-

(Testimony of H. P. N. Birkinbine.)

tion to the map that was in evidence, that was made by Mr. Hill, at the last trial of this case, hadn't he?

A. Yes.

Q. And stated that he thought this trap was not correctly stated on the map? A. Yes.

Mr. WINN.—Well, that is hearsay.

Mr. CHENEY.—Simply an expression of the reasons why he measured that. I don't see why it is objectionable.

Q. Now, I will ask you about the measurements of water, Mr. Birkinbine. Are these figures that were placed here on your map by yourself were they made from actual measurements of the water at the time you were there? [516]

A. They were.

Q. And how were these measurements taken, with a rope, or with a rope, heavy line or steel tape?

A. I had a regular sinker that they regularly have for it, they use for soundings, on to the end of my tape fastened with a piece of wire. Then, I measured the distance from the boat and the sounding, set the zero on my tape, and saw it was two and a half feet there, I added two and a half feet of water in my readings.

Q. Did you read the tape yourself? A. I did.

Q. And you made notes of the actual measurement as it was?

A. As we went along in the boat.

Q. Now, you heard Mr. Hill testify that when he made the soundings which appear on this map, Plaintiff's Exhibit "D," that someone went in a small

(Testimony of H. P. N. Birkinbine.)

boat and when about every forty feet they made a sounding with a heavy line? You heard that statement? A. Yes, sir.

Q. Well, now, how did you make the soundings, Mr. Birkinbine, that you represent here by the figures 13.2, 19.2, 23.3, 25.8, between the trap and the point of the peninsula—how did—how did you make those so you could place them on the map with some degree of accuracy?

A. The boat kept in a line with the face of the trap, what you call the face of the trap, then this way—

Q. Yes, towards Chatham Straits?

A. Yes, and you could keep yourself on that line by eye along the face of the trap; and the angles were turned from this point after the sounding was taken and would have an intersection with this line. All of those angles were [517] from corner No. 1 of the claim, giving the positions of the different soundings.

Q. You say the soundings were turned, you mean with your surveying instruments?

A. With my transit.

Q. And you did it yourself?

A. I did it myself.

Q. Now, what do these figures I have just read, 13.2 and the rest of those figures between the trap and the point of the peninsula represent, that is what stage of the tide there, what tide?

A. They represent the fact the peninsula was at below extreme low tide, I don't recall the date of

(Testimony of H. P. N. Birkinbine.)

the lowest tide, I picked out the lowest one in the book, sometime in June, I think, in the middle of June, I think it was.

Q. This don't represent the actual measurements of water that you made on the 17th or 16th and 17th of February? A. Oh, no.

Q. That is the number of feet? A. Oh, no.

Q. Just explain that to the Court; that is, I am afraid some of us don't understand it; I know I don't.

A. Well, the measurements I took on that day, on that date, has subtracted from it the distance that the water was above the extreme low tide at the time the sounding was made, in order to get the least possible distance—the least possible amount of water that there could be.

Q. At extreme low tide?

A. At extreme low tide, yes, sir.

Q. Did you use the tide book in figuring that?

A. I did. [518]

Q. And also in figuring the measurements that you have here represented by the figures 4.9 at the last lead pile towards the shore,—and what is that?

A. That is 12.4.

Q. 12.4 and 17.4 along that lead indicated by the black piles, and the figures—were they determined in the same way, Mr. Birkinbine?

A. Yes, determined in the same manner, all below extreme low tide.

Q. Then, I will ask you that according to your calculation is this trap of Mr. Alexander's as you

(Testimony of H. P. N. Birkinbine.)

show it on that, on the 16th and 17th of February of this year, including the last pile in the lead, is the entire trap below extreme low tide in front of Barron's Survey 804? A. Yes, sir.

Mr. WINN.—Don't anybody dispute that, the way it stands there.

Mr. CHENEY.—I think some of your witnesses denied or disputed it, some of them said, Captain Mason said that appeared to be out on the tide ground.

Mr. WINN.—Said to be a foot and a half or two feet at low tide.

Mr. CHENEY.—Yes, and said on the June tide would be bare ground, I understood him to say. Anyway, that is immaterial.

Q. Well, now, Mr. Birkinbine, I will ask you if you examined the shore that is the beach along the front of this survey number 804 and went upon the ground there and examined the cabin and the other things that are shown here on this map?

A. Yes, I did.

Q. Did you walk from one end of the survey to the other? A. Yes. [519]

Q. I will ask you this question, whether it is possible for a person to walk at ordinary high tide from this—from this low part of the claim on the west end of the claim to the low part of the ground on the east end of that claim?

A. Well, I did walk from one end to the other of the claim at about high water or possibly—I don't recall exactly whether it was exact low water or I

(Testimony of H. P. N. Birkinbine.)

suppose, well, after high water, from one end of the claim to the other, that is I traveled from corner No. 1 to the intermediate meander point and then to corner No. 2, and then I think it was about an hour after the high tide, that happened sometime in the middle of the day of February the 18th, I think it was.

Q. When did you make your surveys now?

A. Well, I just—

Q. You can refer to that memorandum you have.

A. No; it was the 17th; the survey was made the 16th and 17th; however, think it was the 17th.

Q. That was on the 17th?

A. That was on the 17th.

Q. Was you carrying your instrument?

A. Yes.

Q. And you walked all along this shore within an hour of high tide, that is the whole length of the claim? A. Yes.

Q. Then, did you observe the formation of the ground as to rocks or sand or anything on the beach there along the front of that survey? A. Yes.

Q. You have heard a place herein testified by plaintiff's witnesses to be sandy beach; now, will you explain to the Court what you found in the way of a sandy beach there [520] over on the west end of that claim?

A. Well, I wouldn't say it is what I would term a sandy beach. There are a few places where the water has washed some sand behind or beside the big rocks; well, a big rock where the sand has settled,

(Testimony of H. P. N. Birkinbine.)

but I wouldn't call it a sandy beach.

Q. What is the nature of the shore along here below the extreme high tide line—what is the general nature of the shore along there, Mr. Birkinbine, that is, as to rocks?

A. I would say it would average from rocks as big as your fist to rocks as large as, well, of course, there are some great big boulders there and would be difficult for a man to climb up on top of them, but I should judge the whole thing will not average boulders as big as both of your fists.

Q. Boulders?

A. Boulders, we will say about six rocks, six inches, rather, well, about at six then the average.

Q. Some large boulders?

A. Yes, large boulders, with the exception of this place where I have described the portion here which might be described as a rock outcropping.

Q. Now, Mr. Birkinbine, you heard Captain Mason testify, did you—you were in the courtroom?

A. Captain Mason? He is captain of the "Anna Barron"?

Q. Yes, captain of the "Anna Barron"?

A. Yes.

Q. You heard him state that there was a high bluff extending along the water and towards the east end line of survey 804, within two or three hundred feet of this east end line—a precipitous steep, bluff along there. Now, I will ask you if you—if you observed the ground there on that waterfront—can

(Testimony of H. P. N. Birkinbine.)

you testify whether that is a fact what— [521]

A. The bluff stops right about where I have placed this little cross—asterisk. I probably located the bluff and set a point somewhere in here, I think right about here at the edge of the bluff, and there is another set right about here at the edge of the bluff, in order to fix the limits of the bluff.

Q. What kind of ground is out to the eastward of that and toward the end line of that claim, that is with reference to being a precipitous bluff—or is it a sort of low beach?

A. Well, it is—it rises from the—from tide water back to—I don't know just how to describe it; of course, it isn't like this rock outcropping, but it rises on possibly a ten or fifteen per cent grade, speaking very roughly, and doesn't seem to be the outcropping that occurs right where I have marked with a little asterisk.

Q. That is over near—

A. Yes, around that rocky point.

Q. I will ask you if you took any photographs of that east shore of that claim? A. I did.

Q. What? Did you take any of the other?

A. I did.

Q. West end of the claim? A. Yes.

Q. When did you take those photographs?

A. On the 17th of February.

Q. I hand you a photograph here and ask you what it is?

A. That is taken from the east end of the claim. You will notice the point marked "Photograph 1";

(Testimony of H. P. N. Birkinbine.)

I think it is one and two taken looking towards the south.

Q. Well, now, just step up here.

A. One moment, Mr. Cheney; I would like to inform the Court [522] that the films when these pictures were taken, it is one of these panorama cameras that the lens swings around, you see, you take the picture, and really to get the true value of one of these pictures should be held on a slight curve, like that.

Q. Now, did you take this picture yourself?

A. I did.

Q. Well, you said what day you took it?

A. Yes, on the 17th.

Q. And what hour was it taken?

A. Well, that says eight-thirty; I think about eight-thirty; I don't remember.

Mr. JENNINGS.—Is it marked on the exhibit where that picture is taken from?

Mr. CHENEY.—Yes, sir.

A. Yes.

Q. (By Mr. CHENEY.) Please point out to the Court, Mr. Birkinbine, just where that picture was taken from.

A. Picture one and two were taken from here, I took two pictures in order—

Q. One and two are identical?

A. Possibly a little difference, in rolling the film may have thrown the camera a little.

Q. Why did you take two?

A. To be sure of a good one.

(Testimony of H. P. N. Birkinbine.)

Q. (By the COURT.) Where did you say you stood?

A. At number one and two, you see the little cross?

Q. How far from the end line?

A. That—wait till I get the scale. It is forty feet from the end line, sir.

Q. (By Mr. CHENEY.) And how far is it from the meander line, [523] Mr. Birkinbine, with your instrument?

[Defendant's Exhibit No. 5.]



[Endorsed]: No. 1, Feb. 17, 8:30 A. M., by H. P. M. B. Barron vs. Alexander. Defts. Ex. 5. Recd.
in Ev. R. E. R. [524]

(Testimony of H. P. N. Birkinbine.)

A. Seventy feet; no, it is eighty feet.

Q. Eighty feet from the meander line of survey 804-B? A. Yes, sir.

Q. Was where that picture was taken there where it is indicated by the cross and marked on the map "pictures 1 and 2"? A. Yes.

Q. And you say one and two are identical?

A. One and two are identical.

Q. That is taken from the same place at the same time?

Mr. JENNINGS.—Haven't introduced the picture.

Mr. CHENEY.—I want to introduce them there just the same.

Q. (By Mr. JENNINGS.) That is a correct photograph, is it? A. Yes, sir.

COURT.—They may be received.

Mr. WINN.—We object to that picture, if your Honor please; it is deceptive, misleading, as the evidence shows, from the stand already, the way the picture was taken.

COURT.—Objection overruled.

(Defendant's Exhibit 5 received.)

Q. (By the COURT.) How much of an area is included in that picture?

A. About two hundred and seventy feet to the limits of that bluff, the camera is supposed to include, I think, it is eighty degrees; that would be, well, possibly that far, sir.

(Testimony of H. P. N. Birkinbine.)

Q. Well, I have reference to how much shore of this survey does it cover, does it expose—how much of the shore line of the survey?

A. To about there, sir, just includes a portion of the bluff.

Q. Yes, I understand.

Q. (By Mr. CHENEY.) Now, did you take any more pictures, [525] Mr. Birkinbine, on that day?

A. Yes, sir.

Q. Now, you have marked on that map over on the west end of the claim a little cross there, pictures 3 and 4? A. Yes, sir.

Q. Well, those pictures 3 and 4 are identical?

A. Yes, sir, they are both identical.

Q. I hand you a photograph and ask you if you took that photograph on that day? A. I did.

Q. And what is the number you have on that photograph? A. This is No. 3 taken on the same day.

Q. And was that taken from the spot marked with a cross "Pictures 3 and 4"? A. It was.

Mr. CHENEY.—I offer it in evidence at this time, your Honor.

COURT.—Any objection?

Mr. WINN.—Same objection to it, your Honor.

WITNESS.—Your Honor, I would like to explain the reason for—that this is really—these pictures are a little deceptive unless you hold them a little that way; you will notice when you hold it straight there is a little curve visible on this long log here; if you don't hold the picture on a slight curve with the sub-

(Testimony of H. P. N. Birkinbine.)

ject away from you would make it appear as though the log were curved and as though the beach line were somewhat more of a curve.

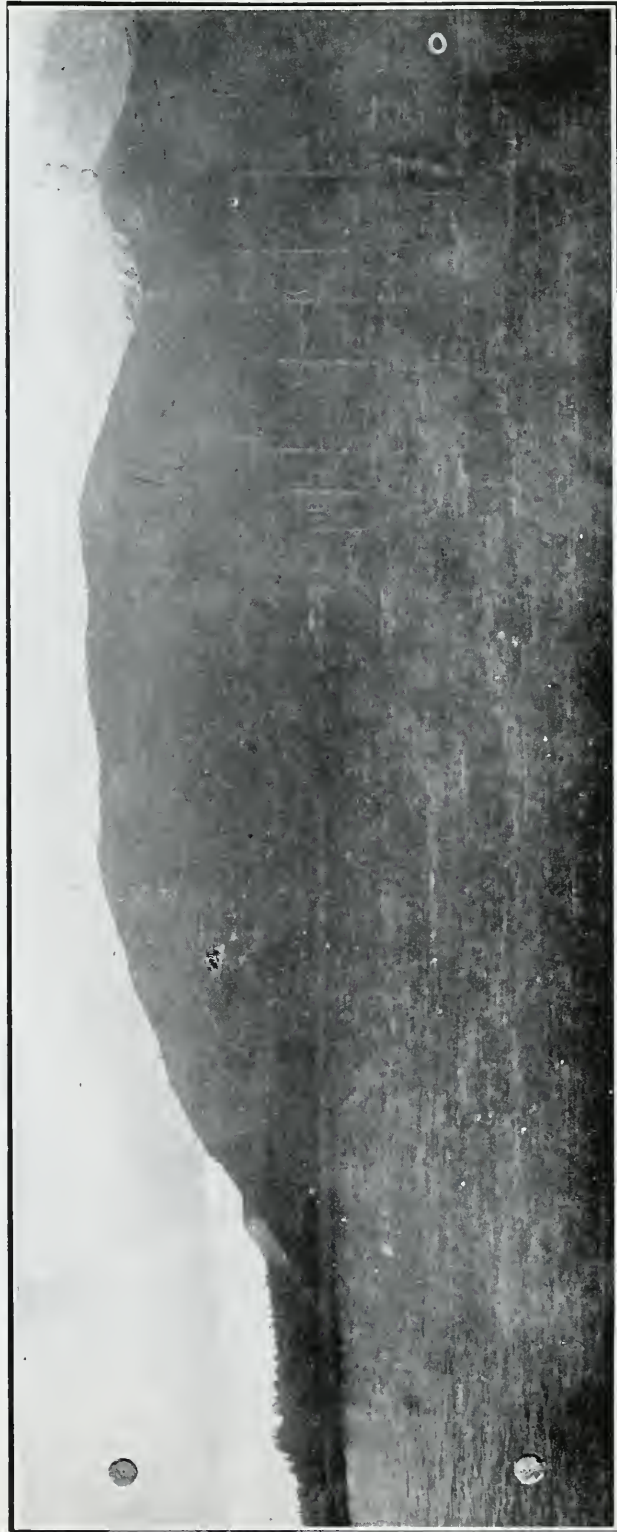
COURT.—You offer it in evidence?

Mr. CHENEY.—Yes, sir.

COURT.—It may be received.

Mr. WINN.—Same objection. [526]

[Defendant's Exhibit No. 7.]



[Endorsed]; No. 5, Feb. 17, 9:30 A. M., by H. P. M. B. Barron vs. Alexander. Defts. Ex. 7. Reed.
R. E. R. [527]



[[Endorsed]: No. 3, Feb. 17, 9:00 A. M., by H. P. M. B. Barron vs. Alexander. Defts. Ex. 6. Recd.
E. R. [528]

(Testimony of H. P. N. Birkinbine.)

COURT.—Same ruling.

(Defendant's Exhibit 6 received.)

COURT.—Proceed, gentlemen.

Q. (By Mr. CHENEY.) I hand you another photograph, Mr. Birkinbine, and ask you where that is taken from and if that is shown on the map, the exact—

A. That is taken from—

Q. —the place where it is taken from?

A. It is taken from the northwest corner.

Q. Of the spiller? A. Of the trap.

Q. Of the trap?

A. Marked "Picture 5," from right over the top of that piling.

Q. And that is taken looking towards the land?

A. Looking northwards towards the land. The picture is very dim, can't see scarcely anything on it; of course the piles have some motion and I had to take—

Q. Is that the same?

A. No, that is not the same.

Q. O, yes, I see; that is a picture of—I offer it in evidence—these are all taken on the same day?

A. All taken on the same day.

Q. All taken by yourself?

A. By myself, yes, sir.

COURT.—Just a moment.

Mr. WINN.—He hasn't marked this one. If you want it marked. Same objection to it.

(Testimony of H. P. N. Birkinbine.)

COURT.—May be received, and objection overruled.

(Defendant's Exhibit 7 received.)

Q. (By Mr. CHENEY.) I hand you another photograph, Mr. Birkinbine, and ask you if you took that photograph on that [529] same day?

[Defendant's Exhibit No. 8.]



[Endorsed]: No. 6, Feb. 17, 9:45 A. M., by H. P. M. B. Barron vs. Alexander. Defts. Ex. 8. Recd.
in Ev. R. E. R. [530]

(Testimony of H. P. N. Birkinbine.)

A. I did.

Q. And is the point that was taken from represented on that map and if so how is it represented?

A. That position is approximate.

Q. Just point out to the Court, then, where it is represented so it will be represented in the record.

A. The position is established at the point marked location picture 6. I, of course, couldn't manipulate myself and be upon shore to triangulate at the same time.

Mr. CHENEY.—Now, I offer it in evidence and ask that it be marked.

WITNESS.—That picture looks northerly.

Mr. WINN.—Same objection; incompetent, irrelevant and immaterial for any purpose, your Honor.

COURT.—It may be received. Objection overruled.

(Defendant's Exhibit 8 received.)

Q. (By Mr. CHENEY.) I hand you another photograph marked No. 7, and ask you if you took that photograph? A. I did.

Q. And is the place you took it from marked on the water in front of the survey?

A. Yes, it is marked approximately.

Q. What is the mark on the map here, Mr. Birkinbine?

A. It is a cross and opposite the cross is marked "Approximate location picture 7 and 8." Both 7 and 8 were identical.

Q. All these are identical?

(Testimony of H. P. N. Birkinbine.)

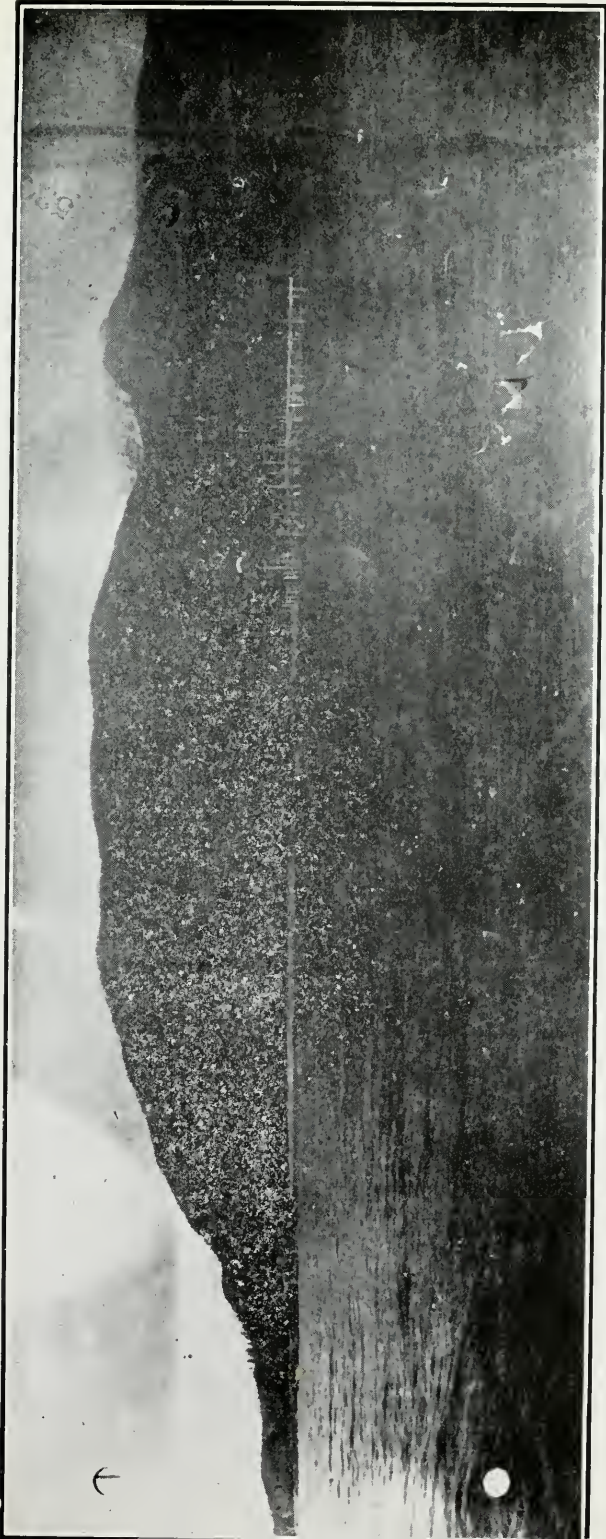
A. The picture looks northerly.

Q. (By COURT.) It looks northerly you say?

A. Yes, sir, that is right in here, sir, northwesterly, northeasterly.

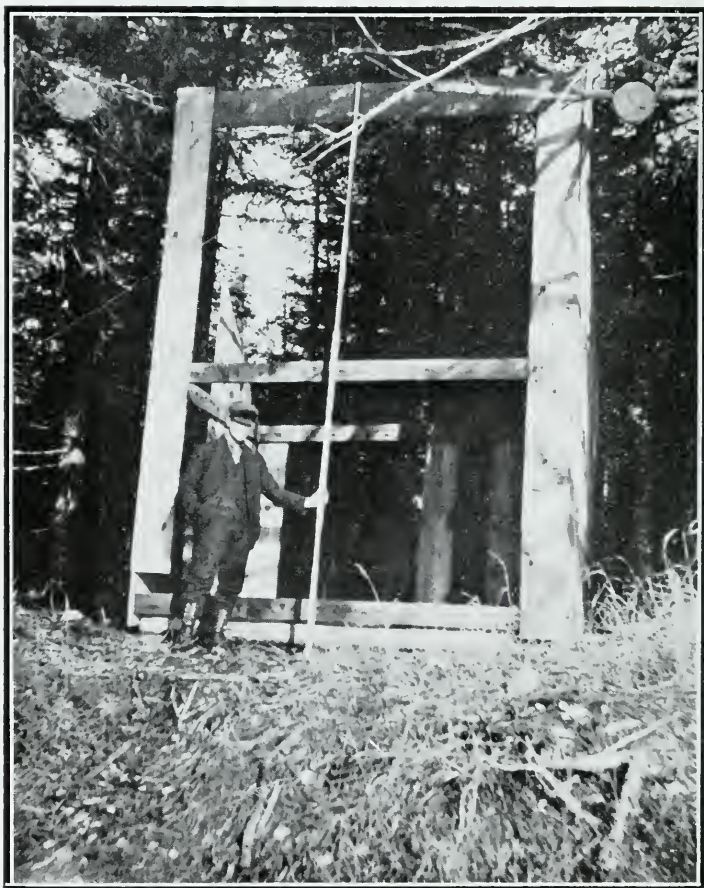
Q. How is that? [531] A. Northeasterly.

[Defendant's Exhibit No. 9.]



[Endorsed]: No. 7, Feb. 17, 10:10 A. M., by H. P. M. B. Barron vs. Alexander. Defts. Ex. 9.
Recd. in Ev. R. E. R. [532]

[Defendant's Exhibit No. 10.]



[Endorsed]: Nos. 1-A & 2-A., 10:20 A. M., Feby. 17, by H. P. M. B. Barron vs. Alexander. Defts. Ex. 10. Recd. in Ev. R. E. R. [533]

(Testimony of H. P. N. Birkinbine.)

COURT.—I see. Offer it in evidence? Any objection?

Mr. WINN.—Same objection.

COURT.—May be received and objection overruled.

(Defendant's Exhibit 9 received.)

Q. (By Mr. CHENEY.) Mr. Birkinbine, did you visit the cabin that Mr. Barron has there and it has been testified to here on this trial on the beach?

A. I did.

Q. On the land. Did you take a picture of that?

A. I did.

Q. I hand you a photograph here and ask you to identify it and state what it is?

A. It is a picture taken from immediately in front of the cabin; one of the assistants was helping me hold a fourteen foot level rod in front of the cabin.

Mr. CHENEY.—I offer it in evidence.

Mr. WINN.—Same objection, if the Court please.

Q. (By Mr. CHENEY.) Taken by you?

A. Taken by me.

Q. That is you took it yourself?

A. On the same day.

COURT.—It may be received. Objection overruled.

(Defendant's Exhibit 10 received.)

Q. (By Mr. CHENEY.) I hand you another picture showing the formation of the shore there, Mr. Birkinbine, and ask you if you took that picture?

A. I did.

Q. On February the 17th, the same day?

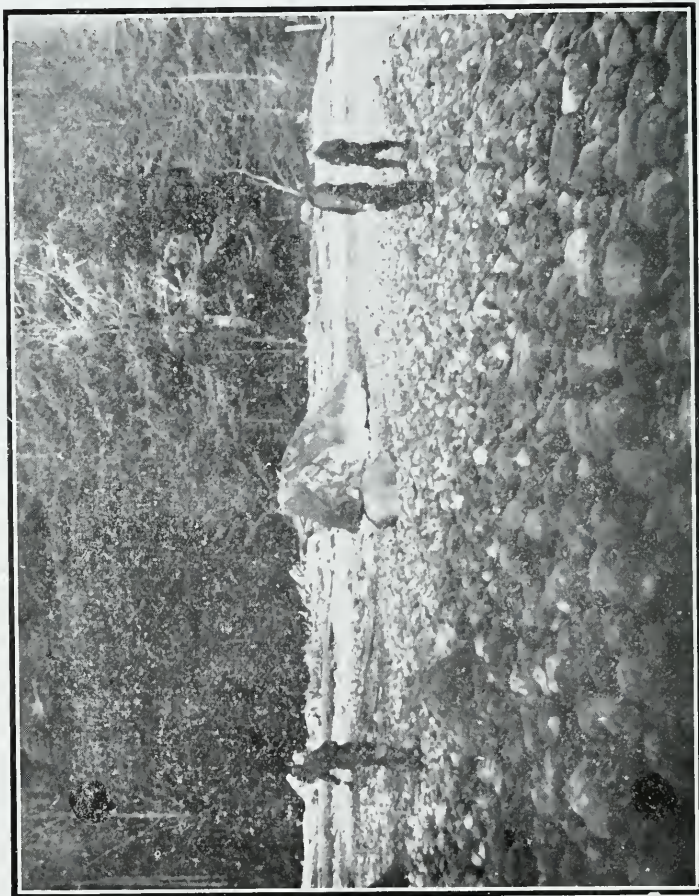
(Testimony of H. P. N. Birkinbine.)

A. Yes.

Q. And what, if anything, does that—

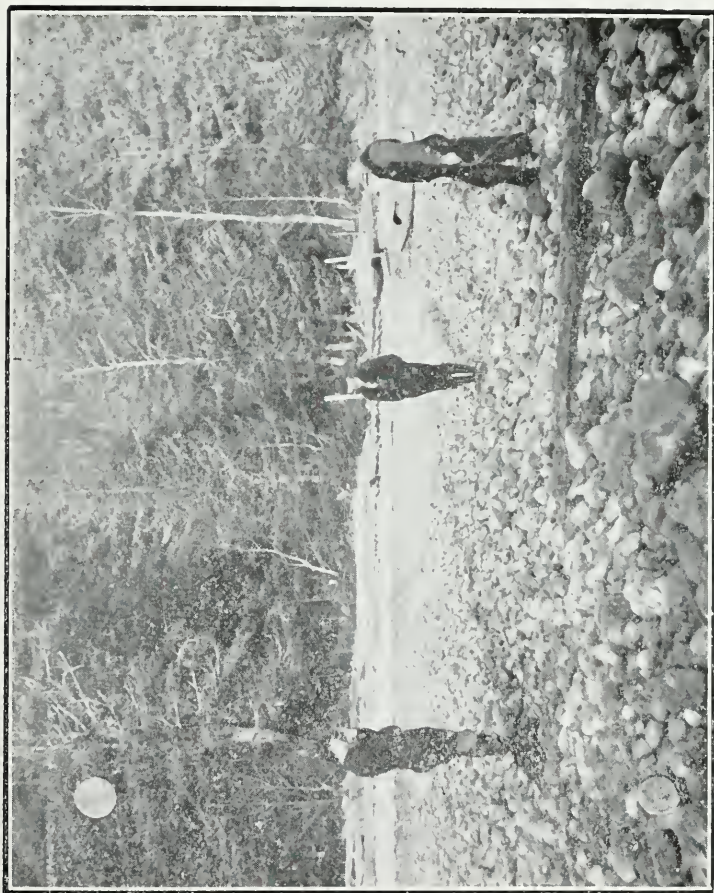
Mr. WINN.—Let me see it. [534]

[Defendant's Exhibit No. 12.]



[Endorsed]: Nos. 5-A & 6-A., 4:25 P. M., Feb. 17,
by H. P. M. B. Barron vs. Alexander. Defts. Ex.
12. Recd. in Ev. R. E. R. [535]

[Defendant's Exhibit No. 11.]



[Endorsed]: Nos. 3-A & 4-A., 4:20 P. M., Feb. 17,
by H. P. M. B. Barron vs. Alexander. Defts. Ex.
11. Recd. in Ev. R. E. R. [536]

(Testimony of H. P. N. Birkinbine.)

COURT.—You may see it before it is offered in evidence if you want to, Judge Winn.

Q. (By Mr. CHENEY.) What, if anything, does that represent with reference to the bedrock along the shore of the west end of this claim towards the water?

A. Well, it only shows a little bedrock, that is taken, I was standing about in the position of the "E" in that "South 79 150 E," I was standing in the position of the "E," I was looking towards the east. It shows the bedrock only one place as the man in the picture is standing on the visible bedrock.

COURT.—Offer it in evidence?

Mr. CHENEY.—Yes, offer it in evidence.

COURT.—Object to it?

Mr. WINN.—O, no, sir.

COURT.—Very well, it may be received.

(Defendant's Exhibit 11 received.)

Mr. CHENEY.—I have several more.

Q. I will ask what that is, Mr. Birkinbine?

A. It is another picture showing the bedrock outcropping which showed up on the southeasterly side of the claim on the beach, shows the character of the beach. Each man in that picture is standing on bedrock.

Mr. CHENEY.—I offer it in evidence.

COURT.—It may be received.

Mr. WINN.—Let it go.

(Defendant's Exhibit 12 received.)

Q. (By Mr. CHENEY.) Now, Mr. Birkinbine, you said you had some experience in the construction

(Testimony of H. P. N. Birkinbine.)

of wharves. You stated what— A. Yes.

Q. —your experience had been. You ascertained the formation of the ground there, did you?

A. Yes. [537]

Q. Along the shore of that claim and you took these pictures? A. Yes, sir.

Q. Now, I will ask you, Mr. Birkinbine, if it is a fact as Captain Mason testified that the water is deeper over on the eastward side of this trap as shown on Plaintiff's Exhibit 4, or Defendant's Exhibit 4, deeper there than it is along that front we will say about the center here over towards the east end line of that claim than it is over in this part in front of the west part of that claim, and knowing the formation of the ground and shore along the meander line of that survey, where, in your judgment, would be the most feasible place to build a wharf in front of this survey if you want to build one?

Mr. WINN.—Object to the question as incompetent, irrelevant and immaterial, no foundation laid for the question and not a proper hypothetical question.

Mr. CHENEY.—It is not a hypothetical question.

Mr. WINN.—I don't know where he has ever built any wharves in salt water and has done any soundings for it; if a man can go along on the shore and look at the shore and tell where a place to build a wharf is he must have a greater insight under the water upon which he didn't do any soundings than he can say what found out about the formation the bottom as described by Captain Mason, and then I

(Testimony of H. P. N. Birkinbine.)

presume as described by our witness, Mr. Alexander, that is in the record of the soundings; they could I presume make some inquiries and so forth, but as to how they made those soundings—but now here they put a witness on the witness-stand who has never built a wharf out in the salt water any place in the ocean.

Mr. JENNINGS.—He has too. [538]

Mr. WINN.—He has testified he drove some piles at Baltimore.

Mr. CHENEY.—It is uncalled for.

Mr. WINN.—I don't care *whether object* to it, absolutely no foundation laid for it, if your Honor please. That won't aid you, his testifying about that. Wouldn't your Honor be in just as good a position to make a guess about this proposition?

Mr. JENNINGS.—Do you object because he has not qualified?

Mr. WINN.—Well, I object to it on the ground, I have just announced my objection.

Q. (By Mr. JENNINGS.) Did you ever build any wharves, Mr. Birkinbine?

A. I have had charge of them.

Q. Do you understand how to build a wharf?

A. Why, I think I do, Mr. Jennings.

Q. Have you driven piles, had charge of driving piles? A. Yes, sir.

Q. How many times? A. Well, more than once.

Q. Well, you testified at the start about that. Did you make any soundings?

(Testimony of H. P. N. Birkinbine.)

Mr. CHENEY.—The Court doesn't want you to go over that again.

COURT.—It is my recollection the witness testified—if he has had any experience in that line he is competent to testify.

Mr. WINN.—I suppose it is a matter of weight.

COURT.—The weight to be given his testimony, the weight of the testimony, but where the witness is not an expert wharf builder, not necessary for a man to be an expert builder.

Mr. WINN.—They took it by soundings; he hasn't testified south [539] of this side; he has sounded out in here, the only place he has sounded.

Mr. CHENEY.—That isn't the only place he has sounded.

Mr. WINN.—Well, he hasn't testified.

Mr. CHENEY.—Well, if the Court please, I will ask, I will base this question on the testimony of Captain Mason who did sound over in here and tested the water for depth. I am not asking the witness about the depth of the water here. I am asking the question and basing it right on the testimony of their own witness, he so testified.

COURT.—He may answer.

Mr. WINN.—Allow us an exception?

COURT.—Yes.

Q. (By Mr. CHENEY.) Do you understand the question?

A. Yes, I think I understand the question; in fact, you want me to answer from someone else's testi-

(Testimony of H. P. N. Birkinbine.)

mony as to the water being deeper on the eastern side?

Q. Yes, sir.

A. —of the trap, and to my own of the beach from we will say ordinary low tide—I have never seen it at extreme low tide, that is extreme low tide line. I have located some soundings—the ordinary low tide to extreme high tide from my personal knowledge of the beach?

Q. Yes, sir. Your own knowledge of the whole situation there and the beach on the testimony of the plaintiff in that case which is that the water is deeper on the eastward side of the trap than it is on the westward where you made your soundings?

A. Well, of course, first, upon the captain's testimony that the water is deeper on the eastern side, then, would mean that you would reach deep water quicker with a wharf than you would from the western side of the claim, that is, this place. [540]

MR. WINN.—I object to burdening the record with that kind of circumstantial evidence.

MR. CHENEY.—I object to your interrupting the witness when testifying.

COURT.—Now, gentlemen; counsel has a right to object if he wants to object.

MR. CHENEY.— —when the witness is in the middle of the answer. Why don't he object to the question?

A. It may be wrong, your Honor.

MR. WINN.—I am objecting to it honestly.

A. It may be wrong, but the way I have explained,

(Testimony of H. P. N. Birkinbine.)

it would be that his pot is now—

COURT.—All right, go ahead.

A. Well, with regard to the wharf from extreme low tide to average low tide, I would say that the eastern side would be the better because of the greater expense, would be very likely to strike, on account of the bedrock that crops out on the west side of the bluff would make it impossible to drive piles; of course, you can set a wharf up there and weight it down.

Q. (By Mr. CHENEY.) Well, Mr. Birkinbine, come right down to actual facts, is the question, when you are considering building a wharf, is the question in considering the length of a wharf to be taken into consideration when you deal with the expense of a wharf? A. O, yes.

Mr. WINN.—Object to the question as circumstantial evidence and burdening the record.

Q. (By Mr. CHENEY.) I will ask you if the holding ground is the same both in front of the eastern portion of Mr. Barron's homestead location 804 and the western portion, if the holding ground for piles is the same, we will say, for the [541] purpose of this question, and the water is deeper in front of the eastern portion of the claim, where would be the feasible place to build a wharf extending out from that homestead survey, in your judgment?

A. East of the outcropping,—that is on the eastern side of the claim?

Q. How long, in your opinion—just as an approximation—would a wharf have to be to come out to

(Testimony of H. P. N. Birkinbine.)

deep and navigable water here if it was built from, we will say, to midway between this rocky point here in the center of the survey number 804 and corner number one and to be sufficiently high-water line to make a wharf—what would be the approximate length of that wharf?

Mr. WINN.—Same objection; incompetent, irrelevant and immaterial.

Mr. CHENEY.—I don't care for exact figures.

Mr. WINN.—Well, immaterial; no foundation laid for witness to answer the question.

COURT.—Well, if the witness knows he can say whether it is necessary to extend the wharf in order to reach deep water, he may answer the question if he knows. Answer the question, Mr. Birkinbine, if you know how far the wharf may have to extend in order to reach deep water.

Mr. WINN.—Another thing, these questions are not based upon any purpose. I suspect, of course, if a man is going to build a wharf he may build it at some place maybe wouldn't cost him fifty dollars and not be a bit of use to him, or maybe in order to build it where it could reach out and use it might cost him several times that much. And further, if Mr. Birkinbine has taken any soundings he knows he can't [542] extend that except as testified to.

COURT.—Well, now, Judge Winn, counsel puts the question to him, assuming the testimony of your people to be true, that is, with reference to the east side of the trap, he testifies from your testimony accepting it as true, and then with his own informa-

(Testimony of H. P. N. Birkinbine.)

tion concerning the physical features of the ground. If you can't prove everything by one witness you may have one expert on wharves, another an expert on steamboats. But it is material to know how far you have to extend the wharf in order to get to deep water. Now, that is one phase of the question. It may be that you can show that a wharf there would be useless, but that is one thing to be proved.

Mr. WINN.—Then, if he is basing it, if your Honor please, upon Captain Mason's testimony, he is basing on the testimony that he couldn't put a trap in here at all because couldn't drive piles—it is based upon that.

COURT.—That part he is basing upon his own actual observations; the water he is accepting from your witnesses.

Mr. WINN.—I think his testimony, your Honor, is so meager, wouldn't be of any help in the world.

COURT.—Well, I think his testimony is competent with the testimony that has been offered by the plaintiff.

Mr. WINN.—I don't care, your Honor, if the Court thinks it is material.

Q. (By Mr. CHENEY.) You can answer the question.

A. The question was, how long would a wharf be on the west side, Mr. Cheney?

Q. Why, approximately, from the place where the plaintiff's witnesses testified it should be built, say, about midway between this rocky point and corner No. 1?

(Testimony of H. P. N. Birkinbine.)

A. There is only one way I can get at the depth of that, [543] Mr. Cheney.

Q. Well, I am not asking you to be absolutely accurate to the inch or a foot or even feet, the best answer you can make.

A. I would say four hundred and eighty feet.

Q. And what proportion as near as you can state, Mr. Birkinbine, what proportion of that would be over this rocky ground where the pictures that have been introduced here of the bedrock—what proportion of that would be over that kind of ground, that is about what proportion of that distance?

A. Mr. Cheney, I couldn't say below the boulders that would be possible to place a wharf there and that only one bent would be on the bedrock, at least would top it so far as could see; of course, we might assume there was bedrock that slid off under the boulders, but I can't swear to that.

Q. Well, I will ask you this: What proportion of it would be before you got to this, to navigable water for ordinary vessels, we would say, that would draw nine feet, ten feet—I want to get the facts, I want to get the facts for estimating what proportion of it if attached up here to the upland would the larger portion be over that shore there before you get out there to navigable water?

Mr. WINN.—Same objection. Allow me an exception?

COURT.—Same ruling. You may answer.

A. Why, I would say about a hundred and fifty feet would be over the part where you couldn't get

(Testimony of H. P. N. Birkinbine.)

sufficient penetration to hold the piles except by weights. Of course, it is possible to put a dock in like I believe, the Wrangell dock, I believe, is a weighted dock.

Q. (Mr. CHENEY.) Yes, it is possible to build a dock most anywhere, that is, by weights? [544]

A. Yes, sir.

Q. That is an estimate you are making now from your observations in front of that claim.

A. Yes, sir.

Q. You haven't tested every foot of the ground and don't make that as a statement of actual feet?

A. No, made no soundings.

Q. (By Mr. JENNINGS.) Mr. Birkinbine, you heard Mr. Hill's testimony that his map was made by triangulation and the use of stadia measurements?

A. Yes, sir.

Q. You testified that you didn't use a stadia?

A. No, I didn't use a stadia.

Q. Now what does that mean; what does "stadia" mean?

A. Why, it is permissible; and when looking in an instrument there are three cross-hairs in stadia as a rule. You only use the top cross-hair; that is the horizontal hair, and the bottom horizontal hair. Now, if there is one part of the rod visible between those two cross-hairs, that means that the rod is a hundred feet away from you, plus the focal length of the instrument, which is probably a foot and a half or a foot and a quarter, because these hair lines are set on a proportion as a rule, of course some instru-

(Testimony of H. P. N. Birkinbine.)

ments are different—as a rule on a proportion of one to a hundred.

Q. Well, what is wrong with stadia measurements, Mr. Birkinbine? Aren't they used?

A. Well, of course, it is—

Q. They are not accurate, are they?

Mr. BURTON.—Object to the question as leading.

COURT.—The question is leading.

Q. (By Mr. JENNINGS.) Are they as accurate as triangulation?

A. O, of course, they are not as accurate as triangulation, [545] that is when triangulation is done several ways.

Q. Well, now, I just want to ask you a question; I don't care whether you answer it. A. Yes, sir.

Q. I just want to know for information—stadia measurements, are they under ban or prohibited, or how are they calculated in surveying?

A. Well, of course, stadia measurements are not permitted by the regulations of the Surveyor-general's office.

Q. Yes, the regulations of the Surveyor-general's office—United States deputy mineral and United States deputy land surveyors are forbidden to use stadia measurements?

A. I think where such cases as it would be impossible to triangulate and impossible to get a tape down a bluff or up a bluff and you would state so, that you took it by stadia, in your notes, they might under those conditions pass it.

Q. But otherwise not?

(Testimony of H. P. N. Birkinbine.)

A. I don't think they would.

Mr. JENNINGS.—That is all.

Whereupon court adjourned until 10 o'clock,
March 20, 1912. [546]

10 o'clock, March 20, 1912.

H. P. N. BIRKINBINE, heretofore duly sworn,
being recalled, testified further on behalf of defend-
ant.

Direct Examination.

Mr. CHENEY.—If the Court please, I would like
to ask the witness just one question in regard to a
picture here.

COURT.—Very well.

Mr. CHENEY.—And then, I will be through.

Q. Mr. Birkinbine, I will ask you if you saw any
improvements in the way of buildings of any kind,
any kind of structures on this survey 804 with the ex-
ception of this little fisherman's—watchman's shack,
that you took the picture of as shown by exhibit,
Defendant's Exhibit 10?

Mr. WINN.—Object to the question as leading and
suggestive, and I don't know of this witness having
testified anything about a watchman's shack. He
said he saw a building there of some kind.

Mr. CHENEY.—Well, if the Court please, the
matter, of course, has not been gone into so much
on this trial but the original complaint in this case
alleges that the plaintiff in this case—

COURT.—I don't care to hear any argument on
the question. I think it is proper to show what there
is on the upland, if there is a shack, whatever it is.

(Testimony of H. P. N. Birkinbine.)

Mr. CHENEY.—I was just going to say that they allege it was worth a hundred and fifty dollars, and had other improvements—gone into on the last trial. It is there alleged—

COURT.—In any event, I think it is competent to show what the plaintiff has on the property as one of the indexes of what he may desire to use it for—what he may need literal [547] rights for.

A. That is the only structure I saw on the—on the claim.

Q. (By Mr. CHENEY.) That is represented by the photograph that you took on what date, Mr. Birkinbine? A. On February the 17th.

Q. Well, let me get your answer fully, Mr. Birkinbine. Was there a structure of any kind in the nature of a fence or buildings or any kind of a structure on this survey 804-B with the exception of this fisherman's cabin or this cabin we will say that you have taken the picture of represented by picture 10?

Mr. WINN.—Object to the question, incompetent, irrelevant and immaterial for any purposes.

COURT.—He may answer. Objection overruled.

A. I didn't see anything that could be called a structure on any foot of the claim which I visited there; I visited, I think, practically the whole claim, there might be a square hundred feet or a square two hundred feet in the middle back portion which I didn't visit. I didn't run the back line.

Q. And you took this picture of the cabin?

A. I took that picture.

(Testimony of H. P. N. Birkinbine.)

Q. Shown by that exhibit, did you? A. Yes.

Q. Well, I will ask you again—I asked you that before, but I will ask you if there was, if there is any part—any part of this fish-trap represented on Plaintiff's Exhibit 4, on Defendant's Exhibit 4, which is the map that you have drawn and testified to, if there is any part of that fish-trap above the line of extreme low tide or about the point that you have marked on your map, I think, a black spot there and [548] with the figures 4.9? A. No, there is not.

Mr. CHENEY.—That is all.

Cross-examination.

Q. (By Mr. WINN.) You say you are a deputy United States mineral and deputy United States land surveyor, Mr. Birkinbine?

A. Yes, I hold both appointments.

Q. How long have you been holding those two appointments?

A. Two years last December, Judge. I don't remember the date of the commissions.

Q. How long have you lived at Haines?

A. It will be four years sometime in April.

Q. Have you been engaged in the surveying business extensively up there since you have been there?

A. In general engineering work and construction work as superintendent and assistant superintendent of construction for the Quartermaster's office and—

Q. You have been doing work over at the army post?

A. Yes, I was there for about two years after I

(Testimony of H. P. N. Birkinbine.)

first came here, and—

Q. And when Ed Webster was repairing the wharf up there, did you say you had charge of the work?

A. Yes, sir.

Q. When was that?

A. I think it was in the early spring of 1909.

Q. When, do you recall when the wharf was originally built? A. No, sir.

Q. This work that you superintended for Ed Webster was repairing the wharf after it had been built? [549] A. Yes.

Q. Now, how many wharves have you ever built? In Alaska?

A. You mean the entire construction from—

Q. Yes, sir. How many places have you gone out— A. None.

Q. No. You never have gone out and found a location for a wharf and constructed the wharf out yourself?

A. No, nowheres; never have done the location, made the location surveys and had charge of the construction of the whole work on any one job.

Q. No, sir. And you stated to the Court what your experience had been, Mr. Birkinbine, in down in Maryland somewhere, you were doing a lot of piling across sloughs and swamps or something for railroad purposes, trestle work?

A. I stated that, in the States, yes, sir.

Q. Now, as I understand, neither in Alaska nor out of Alaska, Mr. Birkinbine, you never have passed as an expert wharf builder? A. No, no.

(Testimony of H. P. N. Birkinbine.)

Q. And never have had the superintendency of the construction of a wharf either in fresh water or salt water, the wharf itself? A. Yes, sir.

Q. In salt water? A. Yes.

Q. Where?

A. From beginning to the end I had—I was superintendent of construction last year of the building of a wharf of the same size, a little different elevation and a little different arrangement, from Fort Ward, Washington, into Puget Sound.

Q. Last year? [550]

A. Yes, sir, last year.

Q. Well, this had been a wharf site before and there has been a wharf on the premises?

A. Yes, I didn't have anything to do with the location surveys of that wharf.

Q. I see, you had nothing to do with the location surveys there, you had nothing to do with the sounding out for the purpose of locating the wharf site originally?

A. No, I had a little to do in making a little extra soundings for some little extra parts of the wharf we were going to do; that is all the soundings I had to do on that wharf.

Q. How many surveys, United States Government surveys for soldiers' additional surveys have you made in Alaska since you have been a deputy?

A. Four.

Q. Where were they—on salt water?

A. Three of them.

Q. Border on salt water?

(Testimony of H. P. N. Birkinbine.)

A. I beg your pardon, there was only two of them bordered on salt water.

Q. Where were they?

A. They were at about halfway between Haines and the Chilkoot Canal, possibly a little nearer the Chilkoot Canal.

Q. Now, do you know what the rules and regulations are that you are governed by in making these surveys in regard to waterfront property?

A. Yes, sir.

Q. After you make your survey, before your survey is approved, is there any examination to be made by the Government in regard to the survey before it is approved by the Surveyor-general? [551]

A. Yes.

Q. By whom is that made?

A. At the present time it is made by Mr. Dupuy.

Q. That is the special agent that has been here that examines all these nonmineral surveys?

A. Yes.

Q. And they go and examine the ground, the land, and so forth, that has been surveyed that is proposed to be patented? A. Yes.

Q. Well, how is it, Mr. Birkinbine, in making those surveys, does the United States Government permit you to include in it any tide lands?

A. No, the lines that you are governed by, your meander line, must be on the ordinary high-tide line.

Q. And they don't allow you to patent what they call tide land property? A. No.

Q. Now, Mr. Birkinbine, how many times did you

(Testimony of H. P. N. Birkinbine.)

go out to this property in question?

A. I went on the—first we arrived on the 16th, that night I think we went back to Funter Bay, I am not very familiar with the map in that district, but I feel confident we went to Funter Bay that night and anchored for the night. The next morning, on the 17th, went back again. Then I happened to be doing some other work in that vicinity and we stopped in there just the 12th of March. The other two dates as a matter of fact was the business. Altogether three times.

Q. Three times. What work did you do when you first went out there?

A. When I first arrived on the ground the first thing I did was to set up—set my instruments up on meander corner No. 2 [552] and sighted towards corner—I will have to look at the map—towards corner No. 3 and turned the azimuth to the intermediate meander point in order to find the intermediate meander point so to get the tape out there, found a little cross on a solid rock at the meander point.

Q. Were any corners established along this waterfront survey? A. Yes.

Q. What corners did you find there?

A. I found meander corner No. 1, meander corner No. 2 and that intermediate meander point which is not termed as a corner.

Q. How were they constructed, the corner points?

A. Meander No. 2 is a boulder, I can't state the exact size, and cross on boulder; and meander No.

(Testimony of H. P. N. Birkinbine.)

1 is a boulder, the exact point marked with a cross and the regular markings are on it which are put on all official surveys.

Q. Which one is the post? A. No. 1.

Q. Over here?

A. Yes, sir, the regular markings are on the others, yes, sir.

Q. Well, what was the one on No. 2?

A. There was a boulder, part of it was exposed and part of it is buried in the beach.

Q. And what was the meander corner down here?

A. The intermediate meander point, sir.

Q. Yes, sir.

A. I didn't mean to correct you but it is not really called a corner.

Q. It is a point, a stake there?

A. A cross on the boulder cut with a chisel.

Q. On the bedrock? A. Yes, sir.

Q. That was there distinctly? [553]

A. That was there distinctly.

Q. These corner posts were all there indicated?

A. Yes, sir.

Q. How were they constructed now? They had a four by four?

A. No, sir, they were crosses cut on a rock.

Q. All the corners were crosses cut on a rock?

A. Yes, sir; the intermediate point was a cross-cut on a bedrock outcropping.

Q. And these other corners, was there any of them ordinary white four by four stakes there?

A. O, no; no, sir.

(Testimony of H. P. N. Birkinbine.)

Q. It was what?

A. It was crosses on a rock, I should say that No. 2 was possibly eighteen by twenty-four inches square, not cut square, of course, but a foot high, twelve inches high.

Q. Here is the exhibit we have offered in evidence in this case which is called Plaintiff's Exhibit "A." You know what that is, don't you?

A. Yes, sir, I know what that is.

Q. Well, on this Plaintiff's Exhibit "E" which is offered in evidence we have got the line of ordinary high tide, the same in that map as it is in the official map, isn't it? A. Yes, sir.

Q. Just the same as it is in the official map. How did you ascertain this high-tide line that you have indicated on this exhibit of yours?

A. Why, I first went to a point below here which I didn't—

Q. Now, when you say "below here"?

A. Below corner No. 1.

Q. Indicate something so it will show in the record.

A. Yes, of course, below meander corner No. 1 I took a pile which I thought was about the right elevation, not with [554] regard to ordinary high tide but with regard to the contour of the beach, to explain it the best, and we made out some distinctive mark there, I don't know what it was exactly but something I could come back to and I took and set my telescope to my instrument, leveled up a target on my rod so as it would read the elevation that was there; then my assistants went around the beach certain

(Testimony of H. P. N. Birkinbine.)

points at the elevation on the beach, not with regard to any distance from the claim or to the claim, the elevation that this elevation would start from as my datum was, and set points, they set twelve points from here.

Q. Well, from here—from where?

A. From opposite meander corner No. 2 to the point on the peninsula above the little “a” twelve points.

Q. That is you went to work and found points along the beach in front of this survey 804—

A. Yes, sir, each point set level with the other.

Q. —that was on a level with each other?

A. Yes, sir.

Q. And then you got those points also so they were on a level with the surface of the ground of what you call the reef down there, the little island-like reef?

A. No, sir, no, sir, they were not level with this island reef.

Q. But these on the beach were all on the same plane, are they?

A. Those points, twelve on the beach, were all on the same plane.

Q. But now what have you to say about this reef?

A. I didn't say anything about this reef down here, sir, yet.

Q. O, I thought you had your finger on it; well, go ahead and tell what else you did in regard to finding this high-tide line.

A. Well, sir, after we had all these points set up by level, we then turned a different angle from these

(Testimony of H. P. N. Birkinbine.)

different points to [555] all these different points around the beach, first from one or the other of these points and one from another, so that we had the cross from two places like that so in order that with the two crosses I could fix the position of each one of these points, that is, I set each one of these points by triangulation.

Q. What did you do all this for?

A. In order to locate the position of these points on my map, sir.

Q. Yes, but I say, how did you ascertain where the high-tide line is on the ground. Of course, I would have asked you afterwards how you placed it on the map, but since you have done so, that is all right.

A. Well, I meant to answer what you asked me, Judge.

Q. Now, then, how did you ascertain what the high tide line, and what is that second line on the high-tide line?

A. This second line I have called approximate average high tide, which is practically the same thing in other words as ordinary high tide.

Q. Well, how did you ascertain that—how did you ascertain how it ran on the beach—how did you know how to place them on the plat?

A. After getting the different elevations along here I then ascertained the height of the tide, the height of low tide for one day and the height of high tide for a day, that is so I had high tide, and I took levels from, one from where I have driven a stake at this low tide to where I had driven a stake at the high

(Testimony of H. P. N. Birkinbine.)

tide and checked my difference in the elevation of the two tides. I then got the extreme highest and extreme lowest and to the extreme low, zero, which gave me the elevations of the other extreme high tide.

Q. What days did you take particularly to—for this purpose [556] of this calculation?

A. For the extreme high and extreme low I took days sometime between the first and middle of June, I think, if I recall the date correctly.

Q. Have you got your data here so you can give me the exact date you took it?

A. Yes, I have got the tide-book here.

Q. Well, let's see the date; what date did you take it? A. June 16th, sir.

Q. June 16th?

A. Yes, after the middle of June.

Q. After the middle? A. Yes.

Q. You took that as the data to go by to aid and assist you in establishing the high-tide line on this property. What was the raise and fall of the tide at that place that day?

A. The rise and fall of the tide—I haven't got that data in my head.

Mr. CHENEY.—You can refer to your tide-book. He is talking about the tide-book.

A. No; this was the particular date and not on the 16th of June. Do you mean the 16th of June, Judge?

Q. Well, you have estimated high tide. I asked you what date you took to establish this high-tide line you have got on the map?

A. Extreme high tide?

(Testimony of H. P. N. Birkinbine.)

Q. Extreme high tide, yes.

A. I took the 16th of June?

Q. The 16th of June? A. Yes, sir.

Q. What was the high tide, how high was the rise and fall that [557] day—that is, suppose you had a perpendicular wall there out at low tide, how high would the tide have risen on that wall?

A. The difference I figured 23.9.

Q. Where did you figure that difference from?

A. I figured it from the tide-book.

Q. 23.09? A. Yes.

Q. Or 23.9? A. 23.9.

Q. You figured that from what data?

A. From the data that is given in the tide-book; yes.

Q. Yes. The tide at what place—well, the tide-book don't give the tides rise and fall of any particular place?

A. Don't give at this particular place but I figured it at Funter Bay.

Q. Funter Bay. Then that is it? A. Yes, sir.

Q. Now, then, just how after you got this data there did you get this line on the ground—you took your tide-book and took the 16th day of June, took the rise and fall of the tide at Funter Bay, you had that data—now, what else did you do in order to locate this line on the ground?

A. I took other elevations around here and determined where my extreme high tide would be and the distances from this line that I had continued to where I had determined the extreme high tide was in my—

(Testimony of H. P. N. Birkinbine.)

in my triangulations with regard to fixing these I measured from these points I had triangulated to for any other information that I could measure either up the beach or down the beach.

Q. I just don't understand it yet, Mr. Birkinbine.

A. Yes, sir. [558]

Q. Now, you have got the high-tide line indicated on this plat? A. Yes, sir.

Q. And, of course, you told me how you got it on this plat located correctly, but I want to find out how you located it on the ground up there or if it is transferred on the ground to the place—you have explained how it is done, but how did you get that particular point on the ground; what means of calculations did you take?

A. Why I have my—have my instrument set up here and the telescope leveled—

Q. Yes.

A. —and I turned the telescope, always keeping it leveled towards the rod and I would tell my assistant to raise his rod two or three feet or to whatever range the telescope showed it should be raised to get to the right elevation.

Q. Did you use a stadia for that?

A. No, not that I have any serious objections to the stadia in a great many instances.

Q. How did you get that low tide in?

A. The low tide line is the result of some soundings that were taken and the soundings are simply interpolated.

Q. Suppose you had two parallel planes?

(Testimony of H. P. N. Birkinbine.)

A. Yes, sir.

Q. Are there—take some part of your upper indications you have got as a high tide and extreme low tide; now, what would be the distance, probable distance between two parallel planes, provided that they tap the ground there at the same angle on each one of these planes?

A. The extreme low tide and the extreme high tide, the difference would be 23.9. [559]

Q. That would be the probable distance?

A. That would be the probable distance; yes, sir.

Q. And that was the way you located this?

A. That was the way I located this; yes, sir.

Q. You went down to the beach to this point which is called the extreme low tide, the place you have it marked there, then you located other points, this twenty-three and a fraction had an elevation off on the side of the hill—

A. Judge, just a minute.

Q. —above that extreme low tide?

A. No, I would like to explain if I can; I think—

Q. That is all right, I am asking how you got, how you got it, you go ahead and testify how you got it.

A. For instance, I would take a sounding here.

Q. When you say “here” put your finger on the line?

A. Just a little, about a quarter of an inch below the “T” of the “letter” approximately average low tide.

Q. Yes?

A. I would take a sounding there and find the ele-

(Testimony of H. P. N. Birkinbine.)

vation of the ground; now, I would—

Q. Elevation of the ground above what?

A. Elevation of the ground above this extreme low tide.

Q. Well, when you got this extreme low tide you was there, out there?

A. I am trying to tell you, Judge.

Q. Yes.

A. Now, after getting the elevation, we will say of two feet, above extreme low tide at this point I have just indicated, supposing we have another one up here forty feet above it, just four feet above extreme low tide, you see, sir, that means that the beach drops two feet in forty; then these [560] lines or figures, all the lines or figures with that ratio are located in the ratio of one foot to twenty, which is the same as two feet in forty, sir. As I said, I did not locate these exact contours, but from elevations and soundings obtained upon the ground I have interpolated these contours.

Q. Would the contour of the ground there have anything to do as to where high tide lines would be thrown?

A. The contour, sir, is the line that the tide makes.

Q. Yes. You have no means of knowing where the low tide was by any indications on the ground, but it is by this calculation you arrived at—

A. Simply by the calculation and by fixing with my two tides; but I have told you I connected up the reef in order to check my calculations on the day that they were taken.

(Testimony of H. P. N. Birkinbine.)

Q. Now, you couldn't get your instrument down here that day, where your low-tide line is?

A. O, no, sir.

Q. That was under water?

A. That was under water; that was water down there.

Q. The absolute, correct way would be if you could have gotten there would be to locate a point—this twenty-three and a fraction above on this upland above there, that would give you an exact or better computation of it if that could have been done.

A. Yes, sir.

Q. But you had to resort to that other method on this account? A. I may explain to you.

Q. Now, how did you get it, how did you get the line on those curves and so forth the way it is now?

A. From different soundings that were taken around there; that would seem to bring them in a little here and they seem to [561] get pretty straight here across to the interpolation.

Q. You made soundings where?

A. I made some soundings around here, yes, sir, that are expressed on the map that were not expressed in figures; they are expressed in those contours.

Q. You didn't make any soundings over on this side? That is the reason the lines are a little more parallel?

A. No, sir; I think I sounded down to about here and interpolated.

Q. To get down to the west end, did you make any

(Testimony of H. P. N. Birkinbine.)

soundings on the west end in front of the west end, that is the east end? A. That is the east end.

Q. In front of the east end of survey 804—did you make any actual soundings there?

A. I made no soundings below the low-water line on February the 16th—that is, I made, of course—I didn't make soundings because I took elevations to as low as the low-water mark on the even date of February, the sixteenth; I don't know just now, as I, of course, can't carry these figures in my head—put that down somewheres.

Q. Well, I want to know whether you made any soundings at all to locate these lines?

A. Yes, sir.

Q. On the east end, you didn't make any soundings?

A. One minute, Judge. I can state accurately whether I have assumed the grade to continue in the same line from beyond approximate average sea level or from below approximate average low tide.

Q. You have assumed that?

A. Yes, sir, I have assumed that grade to continue—

Q. Just answer my question, what I want to know, whether you [562] made any soundings there?

A. No, sir, I did not.

Q. Did you make soundings over on the west end?

A. Yes, sir.

Q. How many soundings did you make there in order to locate these curved lines which you have indicated there, representing the different stages of the tide?

(Testimony of H. P. N. Birkinbine.)

A. Why, other than the elevations which I took on the beach at low tide, I should say about ten.

Q. You didn't put those soundings on this map, did you?

A. Only in expressing them on the contours.

Q. But the figures are not there?

A. No, sir, they are not.

Q. Who was with you when you did this work?

A. Mr. Alexander and Mr. Douglas.

Q. They assisted you? A. Yes, sir.

Q. Who directed this work should be done and that these facts should be ascertained? Did Alexander leave it up to you or did he indicate to you what he wanted you to get, Mr. Birkinbine?

A. Mr. Alexander's instructions to me were, he explained to me the case and said he wanted me to do what I could to conscientiously back up their side.

Q. He explained the case and talked it over and you talked it over with Mr. Cheney too?

A. Mr. Cheney explained to me what the case was and told me something of the case. I can't state just to what extent now.

Q. And you went out and made the soundings on the west side that you have referred to? [563]

A. Yes, sir, the west side of the trap.

Q. And made no soundings on the east side of the trap at all? A. No, sir.

Q. And the only soundings that you put on this exhibit are the soundings that is indicated between the pot or filler (spiller) and the reef?

A. And along the lead of the trap, sir.

(Testimony of H. P. N. Birkinbine.)

Q. Yes, along the lead of the trap. Mr. Alexander was out there when you was getting this data, was he?

A. Yes, sir, he was assisting me in any way he could.

Q. And Mr. Cheney explained to you that he wanted you to figure out the high and low tide lines and also to get these distances you have indicated here?

A. No, sir; Mr. Cheney he didn't; he left it entirely to me.

Q. He left it entirely to you? A. To me.

Q. To you and Alexander?

A. He said to me, sir.

Q. O, to you. Well, Alexander, you did follow Alexander's advice some, didn't you?

A. No, I think Mr. Alexander didn't—not that I remember—

Q. He didn't make any suggestions as to where you should make the soundings at all? A. No, sir.

Q. Didn't make any suggestions as to whether you should make the soundings on the east or the west side of the trap?

A. Why, no, Mr. Cheney had explained the matter to me. I supposed that the only argument would be at all was there the room on the west side of the trap and they wanted me to ascertain that.

Q. Yes, I see. And then that is what you went out to ascertain, [564] Mr. Birkinbine, was to figure out and make your measurements, and so forth, along upon the—on the east of the trap, on the right-

(Testimony of H. P. N. Birkinbine.)

hand side of the trap as you come into the bay?

A. On the west of the trap.

Q. O, it is the west, yes, I got turned around, on the west side? A. Yes, sir.

Q. If you were going right into it from Chatham Straits, that would be on the left-hand side?

A. Yes, sir.

Q. Left-hand side. So it was by reason of these talks that you had with Mr. Cheney and Mr. Alexander that you didn't pay any more attention to the east side than you have testified?

A. Well, Judge, of course, I supposed there was nothing to be done there, and I would hardly do more work or incur any more expense to the man I was working for than was necessary.

Q. Yes. Then, you understood from their talks and conversations with you that the dispute was centered pretty much on the proposition of going into that upland on the west side of the trap?

A. Well, I can't exactly say as to that except what I was hired was only for the west side, sir.

Q. Well, that is what I meant.

A. I can't say as to what their opinions or disputes—you know.

Q. No, I understand that. That question was probably a little leading. But anyway you knew when you was to go out there you was to go out there to get this information which you have and you done it to the best of your ability? A. I did, sir.

Q. Now, Mr. Birkinbine, Mr. Cheney asked you some questions [565] about whether or not a

(Testimony of H. P. N. Birkinbine.)

wharf could be built out from this claim from the east side, that is, from part of the claim that would remain to the eastward of the prolongation of the line of the lead of the trap, and you gave some testimony on that. Now, you don't know, Mr. Birkinbine, whether piling could be driven out there in that part of the water below the line of ordinary low tide or not, do you?

A. I know nothing of the possible penetration or the probable penetration of any of the ground on either side of the trap below the tides which I have seen there.

Q. The tides as they were when you was out there?

A. Yes, sir.

Q. Well, now, let me see, what stage of the tide—what stage or stages of the tide were you there?

A. The tide was running to about average low tide, if I remember correctly, about five feet above extreme low tide.

Q. Any way, you was there the days you were mentioning or—well, the tide-book would show the kinds of tides there was that day? A. Yes; sure.

Q. And below these particular lines of course you didn't see anything of the shore and you wouldn't testify anything of it under water? A. No, no.

Q. You wouldn't want to put your simple judgment from the shore there as it was against anyone's judgment who had gone there with a steamer for the purpose of making an anchorage and taking soundings of that shore, would you, Mr. Birkinbine?

A. I would not—I don't—I would not render any

(Testimony of H. P. N. Birkinbine.)

opinion, sir, for with regard to any possible driving you might get below [566] ordinary low tide; I gave my opinion on my direct as to what I thought was a feasible place for a wharf above where I have seen the tide.

Q. Yes. You don't want the Court to understand that you was giving that opinion at all out into the water above the points that the tide was at the days you were there? A. Below the point.

Q. Yes, below it; I mean out in the water.

A. Yes, sir.

Q. There was no request made by Mr. Alexander or Mr. Cheney that on the east end of this piece of ground that you make any soundings out in front of that piece of ground, was there? A. No.

Q. Now, Mr. Birkinbine, you talked about some methods of locating this reef. I will just get you to explain a little in detail how you located the reef as it is indicated on this plat.

A. The reef was located by a direction from this point opposite "a," which is the little capital—little "a" furthest west on the map, the "a" on the peninsula, to the point which is the highest part and by a distance from a pile in the—which is the southwest corner of the spiller of the trap to this point, sir.

Q. Well, now, you say that you located these points by triangulation?

A. I didn't locate this reef by triangulation because I couldn't see it from here.

Q. You couldn't see it from where—you mean the upland on the survey?

(Testimony of H. P. N. Birkinbine.)

A. From meander corner No. 1, which was one end of my base line. [567]

Q. So you located it simply by the real position that it is in with regard to the pot or filler (spiller) of the trap, did you—just let me get that?

A. With the position that it is in from the dot which is by the “a” on the end of the peninsula, that is, with a direction from there and the direction over there, sir.

Q. I see. Well, now, how did you get that dot that you took there as an initial point, how did you locate that?

A. That is one of my triangulation points. From setting—by triangulating from meander corner No. 1 and from the intermediate meander corner.

Q. You used that as a base line? A. Yes, sir.

Q. For your triangulation? A. Yes, sir.

Q. And located that point. What is the length of your base line that you used for this calculation, Mr. Birkinbine? A. 405.8 feet.

Q. And what distance is this point, that is, approximately, I mean, probable distance from that base line?

A. I can scale it for you but I can't tell you.

Q. Have you a scale?

A. Why, I won't swear that this is accurate; the scale is a little—might be off—may be off a foot or two—the point by “a.”

Q. Yes. Your initial point you established by this triangulation?

A. That is seven hundred and forty-five feet.

(Testimony of H. P. N. Birkinbine.)

Q. Now, how did you locate the trap?

A. By triangulation from the same base line, take the piles which are marked by solid black dots.

Q. How many of those? [568] A. Nineteen.

Q. Nineteen piles. You used this same base line and then located these piles out on the ground as they are driven?

A. Yes, sir; I used the same base line and located all the piles in the trap that I used in locating the peninsula and the point from which I located the reef.

Q. Now, what does your triangulation consist of—continued this as a base line? A. Yes, sir.

Q. You would put your instrument over at corner No. 1? A. Yes, sir.

Q. And what sort of an observation did you make in that course—take any one part of the piles?

A. And the way I took an angle of course had to give the numbers you know—take No. 1 which is the most northerly pile in the lead of the trap.

Q. Yes.

A. I obtain the azimuth of that line, sir.

Q. What do you mean by the “azimuth”?

A. The angle—the number of degrees that that line is east or south.

Q. Well, now, you got that line?

A. We have got that line. Then, of course, after setting up on these points my assistants went around to each point.

Q. To each one of these points, and you made the same observation?

(Testimony of H. P. N. Birkinbine.)

A. The observation at each point.

Q. Observation at each point, Mr. Birkinbine?

A. And then extended up on the intermediate meander point and I obtained the number of degrees west or south of that point number 1 was?

Q. Yes. [569]

A. And then No. 2 and so on around the trap, but of course they were not all west or south, some of them became east or south before we got through.

Q. Well, then, you had the dimension of base line and what angles did you have to make that computation?

A. The angles I read from my instrument, sir.

Q. And then you computed the distance of those—from the two points of your base line that you used as stations?

A. No, sir, I did not compute the distance.

Q. Well, what did you do?

A. I had a large protractor which I protracted this angle. I then protracted this angle and where the intersection of these two angles came was the situation of any pile.

Q. Well, did you get the distance of the pile from this base line? A. I took the rocky point.

Q. Rocky point? A. Yes, sir.

Q. You didn't compute the distance at all?

A. O, no, sir, the distance is in there; that would be much longer than my tape.

Q. Well, after you made your triangulation you could compute the distance?

A. I could have computed the distance if I thought

(Testimony of H. P. N. Birkinbine.)

it would be necessary.

Q. But you didn't do it? A. No, sir.

Q. That is the proper way in making an official survey to compute the distance?

A. Why, it would to compute the distance from corner No. 1 to the location monument, but the location of the corner of a building I don't think it would. I don't think you would [570] where you have direct bearings, but where you have ten or twelve bearings you would have a great loss in error, accumulated error, that would be something different.

Q. You have given now all you did in regard to locating these piles? A. Yes, sir.

Q. In fact, explained it fully. How did you locate the heart—there are one or two of those piles in the heart of the pot marked black; did you use these as objective points on the beach?

A. All the pilings marked with solid black points I located by that same system there.

Q. And it was according to that system you located the trap? A. Yes, sir.

Q. And it was according to that same system you located your point "a" over here near the reef?

A. Yes, sir.

Q. And then, did you measure the exact distance from point "a" down to the reef?

A. No, I didn't measure that.

Q. Did you measure the actual distance from the pot of the trap you indicated here down to the reef?

A. Yes, sir, I did.

Q. With a steel tape? A. Yes, sir.

(Testimony of H. P. N. Birkinbine.)

Q. How long is your tape?

A. Four hundred feet. I had to use two steel tapes in getting the measurement.

Q. Did you splice the tape?

A. No, sir; I held the two tapes at the intersection, the two tapes at the juncture, as you see—so. [571]

Q. You held them together? A. Yes, sir.

Q. And had a man on each end?

A. Had a man on each end.

Q. That is the way you got that distance?

A. I had the readable distance of both tapes myself, both zero ends of the tape were at the objects. I was in the boat and held the readable ends.

Q. Now, you have examined Hill's map here—there isn't very much difference in your map and his? A. Not a great deal, no, sir.

Q. You calculated at the extreme low tides and I thought you said the mean low tides, but I find you have them on your map the extreme low tides?

A. Yes, sir.

Q. You say that the extreme low tides according to your figures, that this last pile that is in the lead nearest to the shore will not be on tide land?

A. I say that providing there isn't a wharf in there will never be on tide land, sir.

Q. Well, I mean, not taking what may be, but I am taking as you find it out there at this time?

A. Yes, sir.

Q. According to your calculation at the extreme low tides it would still be in water?

A. It will still be in water.

(Testimony of H. P. N. Birkinbine.)

Q. And you didn't see the mean low tides yourself?

A. No.

Q. I thought you said mean low tide?

A. I may have made an error but I didn't mean to.

Q. I don't know; I guess I misunderstood you. Then, as I understand you testified at no stage of the tide that pile [572] would not be on tide ground?

A. No, sir, I don't think it would. I say positively it wouldn't.

Q. And you say positively from the calculations you have made? A. Yes, sir.

Q. That is the only positive knowledge you have about it?

A. Except that I took the soundings myself.

Q. That is what I say, from the calculations you made; you was never there in a June tide?

A. O, no.

Q. Now, I will ask you, Mr. Birkinbine, about the east end of this survey, looking down Chatham Straits, does the shore, take it from this survey, and does the shore line—how does it run—you haven't any indication here, can you take a lead pencil and approximately show how the shore line runs a little distance from the—from the easterly end of this claim, Mr. Birkinbine?

A. I am afraid, Judge, that I wouldn't be competent to do it.

Q. You didn't notice that particularly?

A. I may have noticed it at the time but just now

(Testimony of H. P. N. Birkinbine.)

I would not like to do it because I really don't feel sure.

Q. You didn't think it was of much consequence and didn't put it in the map, Mr. Birkinbine?

A. No, if I had thought it was of any consequence—

Mr. CHENEY.—Show on Mr. Hill's map.

Mr. WINN.—Let me examine the witness.

Mr. CHENEY.—Object to it as immaterial.

COURT.—Just a moment. The question has been gone into, Mr. Cheney. If this witness knows anything about it he may answer; if he don't let him say so.

Mr. WINN.—Yes, sir, I would like to have the privilege, if the Court please, of examining my witnesses without Mr. [573] Cheney breaking in; I don't think it is right.

Q. You didn't think it was of any consequence and didn't put it in?

A. Well, Judge, I made no observations and that is the reason I didn't put it in; nothing that I can figure it from at all.

Q. I see; so you wouldn't like to take and put it on the map here because it would be mere guesswork?

A. No, I wouldn't Judge.

Q. Now, on the other end, though, you did get data sufficient to mark what you have on this map, and brought the extreme tide, and so forth, as the shore line would, according to your calculation and judgment, be? A. Yes, sir.

Q. At the different stages of the tide. O, yes—now, Mr. Birkinbine, you haven't anything repre-

(Testimony of H. P. N. Birkinbine.)

sented on this plat of yours that will compare to what is called the peninsula that is on Plaintiff's Exhibit "D" and as indicated, and the words you have, the high tide and bare rock—you haven't anything of that kind on your map?

A. I will state, Judge, that I didn't. I didn't even make any sketch or consider it proper to take up any time to even look at this side of the peninsula. I didn't see it would make any difference, and as I didn't even walk over to that side I wouldn't—I didn't even put it in dots here.

Q. I see. Now, you didn't put it in there; you wouldn't be able now from what data you have to indicate on your map and plat what would probably be the contour of the line of this object I have just mentioned?

A. I have no data in any way that would enable me to sketch it, that is on the west side of the peninsula.

Q. Your principal object, then, as I understand, Mr. Birkinbine, [574] was to get the trap located and locate the reef that you have located on your plat and which has been offered in evidence in this case and to get these tide lands and other data that you have mentioned?

A. To get the east side of the peninsula and the shore of the claim, sir.

Q. O, let's see some of those pictures just a minute; then, that is all I will have, your Honor. Your Honor will pardon me for being a little slow this morning; been a little under the weather.

Q. These photographs that you have offered in

(Testimony of H. P. N. Birkinbine.)

evidence, Mr. Birkinbine, were taken by what is called a revolving camera?

A. Yes, sir—no, I beg your pardon, the whole camera doesn't revolve; simply the lense in the camera, it revolves.

Q. You have seen those revolving cameras?

A. The revolving camera is a little too much for me. I am afraid I wouldn't know how to work it.

Q. That is the reason your log looks something like a barrel hoop?

A. That is the reason makes them look round that way, and the reason you have to hold the picture on a slight curve to take that look out, otherwise you hold it straight this line here and the other one have the appearance of a round bay.

Q. I see; even your shore line would be on a curve the same as your log? A. Yes, sir.

Q. Now, this photograph—what is it?

A. Exhibit 6.

Q. Now, where were you, Mr. Birkinbine, when this picture was taken—what was it taken on—indicate it on this plat of [575] yours there with reference to survey 804.

A. The camera was out at the cross marked "Pictures 3 and 4." This picture is No. 3. No. 4 was identical, just taken to be sure to get a good one. And the camera was pointing—the center of the camera would point about towards the, at the south, the extreme southwest corner pile of the trap, about towards this pile here, sir; that is about the center, I think.

(Testimony of H. P. N. Birkinbine.)

Q. What is that—that reef that makes out?

A. That is the peninsula, sir.

Q. That is the peninsula?

A. That is the peninsula. This is the place where Mr. Hill has marked “bare rock covered at high tide.”

Q. O, I see. This is what?

A. There is a little place here which is never covered. You see a little vegetation growing there; I didn't sketch it because a very little thing and I didn't—I would have to carry levels way out there, couldn't depend on taking a shore line because the waves make great big runs up there.

Q. You don't remember about what was the stage of the tide when this Defendant's Exhibit 6 was taken?

A. The stage of the tide—let me see, Judge; the tide was about half in; it was coming in from low tide.

Q. About half in? A. Yes, sir.

Q. The reef you have marked on that map and plat don't show up in this photograph, does it?

A. No, I think, Judge, that—I don't think would be visible from here. I say positively it wouldn't be visible or else I would locate it from this corner. This is at 1 or very close to corner No. 1. [576]

Q. Let's see; why wouldn't that be visible?

A. Well, because the reef—nothing that stands behind this point—just a small snap.

Q. Have you any of these photographs to show that reef?

(Testimony of H. P. N. Birkinbine.)

A. No, I have no photographs to show that reef.

Q. Did the reef show up at any time while you was there? A. Show up?

Q. Above the water?

A. A little bit, not very much.

Q. None of the photographs show that?

A. O, no, none of them, I know it for sure, Judge.

Q. Now, let me see one of these or two of the other long ones; here is the one that is marked—well, you see the mark on it.

A. That is marked “No. 5.” That picture I can’t tell very much from, is very poor. I was standing on this pile here.

Q. You were standing on the trap, by the trap?

A. No, I was standing on the northwest corner or westerly of the spiller here.

Q. The rectangular part of the trap?

A. Yes, sir, where the word “picture” and “5”—that is here, that picture was taken over here.

Q. Were you looking in the direction of the lead pile—the lead of the trap?

A. I was looking northeasterly about a little east of the cabin.

Q. The cabin don’t show up?

A. No, sir, that picture was very poor, of course, from the motion, took from the trap, and I had to take a very quick exposure.

Q. This would be showing the ground then, Mr. Birkinbine, on what end of this survey No. 804?
[577]

A. That would show the ground on the—more

(Testimony of H. P. N. Birkinbine.)

particularly on the west end.

Q. On the west end?

A. But would show it a little bit, the piles on the east end, but the fact is it don't show anything now.

Q. What is this other one—possibly a little bit better?

A. That is No. 7—pictures No. 7 and 8 which are identical and taken from approximately where the cross and approximate location of picture 7 and 8; the direction of that picture is north by a little east, you see, north by—about the center of the picture about points towards the eastern end of this rocky bluff.

Q. What part—what part of survey 804 would be shown on this picture, Mr. Birkinbine—that is to the best of your ability to state?

A. The trap hides the east side of it, that is the part of the claim which is to the east of this rocky bluff, and the only part which shows is the rocky bluff and the western side of the claim.

Q. Is that where that little beach is—does it show the beach there?

A. Yes, sir, shows the beach on the western side.

Q. Yes?

A. The beach runs from that—it is very dim, Judge.

Q. It is indicated by that light line?

A. That light line.

Q. In the foreground of the picture?

A. Yes, sir, and the rocky bluff is over there to there.

(Testimony of H. P. N. Birkinbine.)

Q. And you can see all of the west end of this claim in this photograph?

A. No, sir, the trap—the trap hides the westerly—the trap causes it— [578]

Q. You didn't testify to that one. I didn't ask you about that one?

A. No, sir, this one was taken—

Q. Now, you are talking about what exhibit now?

A. This is Exhibit 8.

Q. Where was that taken from?

A. It was taken from approximately from the cross marked "Approximate location picture 6" and is looking on the northerly, on a north—

Q. Place your finger on this exhibit of yours, on your map, and show about where you were when this picture was taken. A. Right here, sir.

Q. And does—does the west—no, the east end of the survey show up in that picture?

A. Yes, very slightly, right in here, sir.

Q. About—can you indicate on this photograph, Mr. Birkinbine, as to where corner No. 2—that is 2?

A. Yes, sir.

Q. —of this survey would be, if you could, if not—

A. No, Judge, I can't, it is not distinct enough.

Q. You can't? A. I am sorry I can't.

Q. That is all right. That is all, your Honor.

COURT.—Any redirect examination?

Redirect Examination.

Q. (By Mr. CHENEY.) Just a question or two, Mr. Birkinbine. You have been questioned to some

(Testimony of H. P. N. Birkinbine.)

extent about what you were asked to do and asked to show on your map by myself. Now, you were serving here on the jury, weren't you?

A. Yes. [579]

Q. And I asked you first, I believe, about this survey, didn't I, about making the survey, I spoke to you about it?

A. Yes, I think both you and Mr. Alexander were together in Burford's; I think you were playing pool and Mr. Alexander came in and wanted to know whether or not I could find any fellow from Haines—

Q. Well, that was when you first knew about it, but you was here in the courthouse; isn't it a fact that when I called you over and took you into Mr. Robertson's office and asked for the exhibit which was their survey or map that had been in evidence at the last trial? A. Yes, sir.

Q. And didn't I tell you we had no survey or map of Alexander's and that I asked you to look over that map that Mr. Robertson showed you and that you examined that map and afterwards went out with Mr. Alexander and made the survey, and that I told you that Mr. Alexander had said when the trial was on last year he thought it was—that the map that Mr. Robertson showed you wasn't exactly correct with reference to the location of the piles, the peninsula and the bare rock and the trap and the distance between them?

Mr. WINN.—I object to the conversation as being hearsay.

Mr. CHENEY.—You drew it out.

(Testimony of H. P. N. Birkinbine.)

COURT.—I don't think it is material at all.

Mr. CHENEY.—Why does he ask all these things trying to make a record here?

COURT.—The witness has said he has done that and he has told just what he did.

Mr. CHENEY.—But, your Honor, counsel has questioned him so much if he made soundings on the west side of the trap and not on the east side and it calls for an explanation. [580]

Mr. WINN.—I will withdraw the objection to save any time, I will withdraw the objection to save any time.

COURT.—You can answer the question, Mr. Birkinbine.

A. Mr. Cheney told me that he thought the trap was closer to the peninsula on the map than it was in reality and that was one thing he wanted to ascertain, whether the trap was closer to the peninsula.

Mr. JENNINGS.—On the map.

Q. (By Mr. CHENEY.) You made that survey in your own way, didn't you? A. Yes.

Q. Mr. Alexander didn't tell you how to make it?

A. O, no.

Q. And he didn't tell you how to make it?

A. No.

Q. But you saw on the map that Mr. Hill had made and was introduced at the last trial, the map that Mr. Robertson showed you, showed the soundings and the marks there on that map, and I will ask you if that was the reason you thought it was important to get the depth of the water and the distance

(Testimony of H. P. N. Birkinbine.)

between the trap and the point there?

Mr. WINN.—Now, I object to this question, not proper redirect examination and argumentative and leading and suggestive.

COURT.—He may answer. I don't think it is very material.

A. Well, as I said in my cross-examination that I thought the whole argument when I went out there, I thought that the argument was going to hinge on the mouth of this space between the peninsula and the trap, therefore that is the reason I made the little cross-section on the map. [581]

Q. (By Mr. CHENEY.) And you thought it was important to get the exact distance from the trap as it stands at this time and the peninsula and the bare rock, didn't you, that was the reason you measured it with tape?

A. Yes, that was the reason I got it as I stated, and measured it with a tape.

Q. You were not told not to make any soundings on the east side of the trap by either myself or Mr. Alexander?

A. No, Mr. Alexander asked me the second day, "Have you got all you want?" and I said, "Yes." He didn't ask me if I wanted anything more or anything about it.

Q. Now, you were asked something about—you stated that you had never constructed a wharf, that is, had the sole construction of a wharf in salt water. I will ask you if you ever had any experience in the actual building of a wharf, that is in the management

(Testimony of H. P. N. Birkinbine.)

and supervision of it, into salt water, and, if so, for what distance and at what place?

Mr. WINN.—I object to it as immaterial, incompetent and irrelevant.

Mr. CHENEY.—The witness started—

Mr. WINN.—Just to save the record.

Mr. CHENEY.—It is redirect.

Mr. WINN.—I don't think it throws any light on this case, if the Court please, I am not doubting Mr. Birkinbine's mechanical ability to build a wharf; it is only this, he says he don't know anything about the bottom of it at certain places, and so forth.

COURT.—I think it has been covered in direct already, but you may answer. It seems there are a great many questions on it.

Mr. CHENEY.—We could get through quicker if Judge Winn didn't object and then withdraw his objection and take up [582] the time.

A. I stated, Mr. Cheney, on cross-examination I never had to do with a wharf for the entire construction of the location surveys for the location of anyone particular wharf; I have, however, been on the entire construction of a wharf into salt water.

Q. For what distance?

A. That is not including any location surveys for locating that wharf.

Q. I understand, but what was the work you did, that is what I am getting at?

A. Why, I think the approach, considering the approach to the wharf, the whole thing was about twelve hundred feet long.

(Testimony of H. P. N. Birkinbine.)

Q. And I understand you to say that you had experience in the construction of wharves and trestles some place down in the east or where, down in salt water, there—before you came to Alaska?

A. Yes, I have. Well, I have made location surveys for—for a wharf at Hampton Roads, went out as far as thirty-eight hundred feet. We also made some soundings, that was for the penetration we had to get; then, I was made—I have been inspector of pile-drivers one time and another.

Q. Inspector of what? A. Pile-driving.

Q. Pile-driving? A. Yes, sir.

Q. For the Government?

A. Yes, for the Government.

Q. You have been railroad surveying up here in Alaska for Rosene and different people in Alaska?

A. Well, the question, while I have done a little survey work for Rosene, but most of my work for Rosene has been reconnaissance work, just observations. [583]

Q. Preliminary?

A. And practically no instruments besides the man running the barometer for obtaining your height, that is, no instruments besides the barometer and field-glasses and camera and one thing and another, just for reporting purposes.

Q. Well, now, Mr. Birkinbine, if you will just briefly give the explanation, if you have any that is, as to what your opinion is—I withdraw that—can you give the Court any reason of your own why you think Mr. Hill's survey may be different from yours,

(Testimony of H. P. N. Birkinbine.)

—with the location of this reef, that is, his map locates this reef over here nearer the trap and yours nearer this way, besides what you have already given; if you have any explanation of that kind, Mr. Birkinbine, you will have an opportunity to give it. You were asked about it by Judge Winn.

A. Well, of course, I don't know how Mr. Hill may have gotten the reef over there. I don't know what directions or whether his trap was located on the same base line that his reef was, and if it isn't why the connections between the two base lines might not have been—might not have been correct or something like that—is a very hard thing to state where a man might have made an error or how he obtained results that he did.

Q. Well, is there anything that would account for a few feet difference in the two maps? In relation to the intermediate point there?

A. Well, if Mr.—if Mr. Hill used that portion of the meander line east of the intermediate point we will say for the location of the trap and the portion of the meander line west of the point as the base line for the location of the peninsula, he might have gotten an error in there [584] as those two meander lines—the angle between those two meander lines is not as called for by the Surveyor-general.

Q. That is what you mentioned yesterday—did you mention that? A. No, I didn't mention that.

Q. Now, what was that last part of your answer,—what isn't called for by the Surveyor-general? Just explain to the Court.

(Testimony of H. P. N. Birkinbine.)

A. I suppose when the official survey was made there was a little error in closing, and in order to bring that error out they made a little different angle at this intermediate point than is in reality because they generally throw the closing, I believe, in such cases as that on the meander point because the meander line is something which is indifferent, you see. This is not a corner here—and I found the angle at that meander point one degree from what—exactly one degree from what the Surveyor-general reports it. That might have made a difference. I also checked this by measuring from the corner to the bearing of the trap and found that that would situate the corner where my instrument had situated it from the intermediate meander point.

Mr. CHENEY.—That is all.

Mr. JENNINGS.—Just one question, Mr. Birkinbine.

Q. Now, irrespective of your survey and Mr. Hill's survey— A. Yes, sir.

Q. —is that bare rock, that reef between—no, irrespective of any survey at all, is that what has been the reef, this here is a reef—is that part of what has been also reef, to the east of the bare rock and trap?

A. No, sir.

Q. It is not. Now, that is from observation?
[585]

A. Well, some observation.

Q. I don't mean technical observations, but looking at it you say it is not part of the two?

(Testimony of H. P. N. Birkinbine.)

A. I have run right along there a steel tape from the trap.

Recross-examination.

Q. (By Mr. WINN.) Now, how much of this reef you call it, that is bare rock, represented this in the Defendant's Exhibit "D," was visible while you were out there?

A. About forty feet of it, Judge; forty feet in length, that is about, I don't remember just what my figures were.

Q. And did you, upon the data that you have, would you be unable to place this bare rock or reef and peninsula on this map or plat of yours, Mr. Birkinbine?

A. Sir?

Q. I say, from the information that you have and the data, would you now be unable to place on this exhibit this peninsula called bare rock, and so forth?

A. I beg your pardon.

Q. What else?

A. I beg your pardon; I answered that bare rock; I made an error; I thought you meant this reef, this island. I beg your pardon but made an error.

Mr. CHENEY.—It is Judge Winn's error. He asked for bare rock.

A. Will you please ask the first question again?

Q. (By Mr. WINN.) You told Mr. Cheney that outside of all the surveys and everything else that something was not between the trap and the bare rock?

A. This reef, sir, isn't between the trap and the bare rock.

(Testimony of H. P. N. Birkinbine.)

Q. Well, it isn't between the trap and the bare rock on Mr. [586] Hill's map.

A. No, Mr. Hill shows it a little closer to the trap.

Q. Well, let's see.

A. If we were going to get technical we might, I don't know, call a portion of it between—yes, it is.

Q. Well, the bare rock, probably some of it would show up there.

A. Is that the extreme reading, the bare rock—that isn't the bare rock.

Q. Where is the bare rock?

Mr. CHENEY.—Talking about the reef.

A. With respect to the surveys—

Q. But you don't know what stage of the tide except in feet in this case Mr. Hill made that bare rock and reef.

A. What stage of the tide Mr. Hill made of the survey?

Q. Yes.

A. No, I don't know it, Judge. You asked me another question about how much of this bare rock was exposed and I made an error and I answered you for the reef. If you would like to ask me over again I would like to correct myself.

Q. All right, I am going to ask you that. Now, on your plat—now on your plat that is called Defendant's Exhibit 4, on your plat— A. Yes, sir.

Q. —Defendant's Exhibit 4, you have the reef somewhat smaller than the one that is represented as reef on Hill's map, have you?

A. Yes, sir; that is the point.

(Testimony of H. P. N. Birkinbine.)

Q. Were you there at low tide on either one of these days you were there?

A. I don't know as I was out just at the time the tide was low. I don't remember just the time of the day I was out [587] there, sir.

Q. During—did you intend to show all of that reef on your exhibit 4—the reef now, I mean, that is the little round spot? A. Yes, sir, I intended to.

Q. Well, how does it drop off from that?

A. It drops off gradually at first and then gets steeper, sir.

Q. Well, you didn't—you aren't stating to the Court but at what state of the tide there would be more of that reef showing than is indicated by your map and plat?

A. That is what I intended to state so.

Q. That there wouldn't be any?

A. At extreme low tide?

Q. Wouldn't be any more at extreme low tide?

A. Yes, sir.

Q. Does the ground ever get—ever get bare between that reef and the peninsula that makes out there called bare rock—do you know whether it ever gets dry between those two there?

A. I don't think it is; I can't swear; I was out at the lowest part of that little saddle; but I don't think it does.

Q. You mean that all the ground that lies between the trap and what you have put on there as a reef is navigable water at all stages of the tide?

A. Well, Judge, there is a great deal of differ-

(Testimony of H. P. N. Birkinbine.)

ence—navigability has a very broad meaning; I would hate to say anything about it.

Q. Well, but what would you say at the lowest stage of the tide in reference to the depth of the water right along about where you have indicated that reef?

A. Well, as I say, I haven't really got—I can't swear to having [588] sounded in this owing to the fact of the distance between these two. I located the little island from the end of the peninsula and I let it go at that because I didn't think I would be asked to state that it was at all navigable. I didn't suppose it was.

Q. Now, let's see. You take Hill's map and your map, just for the sake of the record. That will be the last question I will ask you, Mr. Birkinbine. And state—

A. Yes, sir.

Q. —and state from the nearest point of this reef to the nearest point of this trap or any portion of the trap, to get the distance, and then state what Hill took the distance. Let's see what the difference is.

A. The nearest point, referring to the nearest point of the trap, sir?

Q. Yes, sir. Any portion of the trap.

A. That is the extreme eastern side of the reef or the little island?

Q. That will be all right. The nearest point shows—

A. All right.

Q. I just want to show—

A. To the southwest corner of the spiller, I make that, sir, three hundred and fifty-two feet. I would sooner call it—fifty feet, to be sure.

(Testimony of H. P. N. Birkinbine.)

A. Well, three hundred and fifty feet. What does Mr. Hill make it? A. Same scale, Mr. Hill.

Q. Same scale; yes.

A. Call it two hundred odd or sixty feet—sixty-two, maybe.

Mr. WINN.—That is all. [589]

Mr. CHENEY.—That is all.

COURT.—Just one question, Mr. Birkinbine.

Q. I must have misunderstood you yesterday. I understood you to say by tape-line you measured from the west side, with a tape-line to the trap would be four hundred and twenty-one feet?

A. To the dot on the reef; that is the point the reef was located on.

COURT.—Very well.

Mr. CHENEY.—I will call Mr. Douglas. [590]

[Testimony of W. T. Douglas, for Defendant.]

W. T. DOUGLAS, being duly called and sworn, testified as follows on behalf of the defendant.

Q. (By Mr. CHENEY.) Give your name, state your name and residence.

A. W. T. Douglas; Juneau, Alaska.

Q. What is your occupation, Mr. Douglas?

A. Well, mostly pile-driving.

Q. Mostly pile-driving? You testified at the hearing on this case last March here, didn't you?

A. Yes, sir.

Q. And you helped drive the fish-trap that Mr. Alexander now has out there in the cove that has been testified— A. Yes, sir.

Q. —about. You are familiar with that trap loca-

(Testimony of W. T. Douglas.)

tion? A. Yes, sir.

Q. And with the shore along in front of this survey, are you? A. Yes, sir.

Q. I will ask you if you were present on February 16th and 17th of this year when Mr. Birkinbine made a survey of this homestead and the trap—were you present on that day? A. Yes, sir, I was.

Q. And did you assist in making the soundings that were made and appear here and have been testified to by Mr. Birkinbine?

A. Yes, sir, I was in the boat.

Q. You were in the boat and assisted him?

A. Yes, sir.

Q. What were those soundings made with, a rope or tape? A. Tape, a steel tape.

Q. A steel tape. And were you present when these pictures that are introduced in evidence were taken?

A. Yes, sir. [591]

Q. When these pictures were taken?

A. Yes, sir; I was.

Q. I just hand you exhibit No. 11, which is a picture, No. 3,—are you one of the men whose picture shows in that photograph?

A. Yes, sir, I am.

Q. What were you standing on?

A. Standing on the bedrock.

Q. Were you present when picture No. 1 was taken—that was the picture taken at this point marked with a cross over on the east side of survey 804? A. Yes, sir.

Q. You were right there at the time the picture was

(Testimony of W. T. Douglas.)

taken, were you? A. Yes, sir.

Q. What is the—is there a high bluff over here on this end of the survey or is it just as is represented in that picture?

A. It is just as represented in that picture.

Q. This end over on the east and here was quite a distance from where the end line is located?

A. Yes, sir.

Mr. WINN.—Object to the question as leading and suggestive.

COURT.—He has already answered.

Q. (By Mr. CHENEY.) I will ask you if you know—I don't know whether you do or not—I will ask you whether or not the water is deeper in front of the east end of this survey than it is in front of the west half of the survey?

A. Well, I don't know. I didn't make soundings there but I think would be, judging from the shore, the water is deeper on the east side than on the west side.

Q. Well, to come down to the map just for a question, Mr. Douglas; look at the figures that show the depth of water [592] where marked 4.9 at the lead pile, for instance. I will ask you that—first, does that represent the correct measurement that you assisted in taking that day of the depth of water?

A. Well, I couldn't swear whether it was a correct measurement, Mr. Birkinbine took the measurement.

Q. He read the tape? A. He read the tape.

Q. Did you assist?

A. I was out in the boat, rowing the boat when the

(Testimony of W. T. Douglas.)

measurement was taken.

Q. You know—I will ask you nothing about the survey now—but don't you from your observation—you have been there a great many times?

A. Yes, sir.

Q. And for a considerable number of days and weeks at a time, haven't you? A. No, sir.

Q. Well, you have been there how many times?

A. Well, I could not just exactly state how many times I have been there.

Q. Well, you was there last year in March for several days? A. Yes, sir.

Q. And several days at a time? A. Yes, sir.

Q. Assisted in the entire building of the trap?

A. Yes, sir.

Q. And were you there any time after that until this February? A. Yes, sir, I was.

Q. When—during the summer? A. Yes, sir.

Q. You have seen that trap then at all stages of the tide? [593]

A. No, sir, I haven't,—that is, not to remember.

Q. But I mean whether you remember it or not, but you have been there at all stages of the tide?

A. Yes, sir.

Q. During the past year? A. Yes, sir.

Q. Then, I will ask you this question, if from your actual observation during the past year you know whether or not this lead of Alexander's trap is below extreme low tide, from your observation?

A. Well, any time I have been there that pile has never been dry.

(Testimony of W. T. Douglas.)

Q. And you have been there—well, were you there part of the summer?

A. No, sir, I didn't work there in the summer.

Q. Were you there during the summer?

A. Yes, sir, I was.

Q. And you were there during the month of March, some part of the month of March last year?

A. Well, practically all during the month of March we went there, that is off and on.

Mr. CHENEY.—You can sit down.

Mr. WINN.—Is that all?

Mr. CHENEY.—I think so, I think that is all from this witness.

Cross-examination.

Q. (By Mr. WINN.) You went there with the pile-driver when they first commenced to drive the trap, with Alexander, did you, Mr. Douglas?

A. Yes, sir. [594]

Q. Have you ever been in there before—had you ever been in there before?

A. Prior to this time?

Q. Yes, sir. A. Yes, sir, I had.

Q. Were you there when the Alaska Packer's Association trap was there?

A. Yes, sir, I was there once.

Q. Where is this trap of Alexander's with reference to where that trap was?

A. Well, that I could not state, Judge.

Q. You couldn't state that?

A. But as near as I can remember, it is pretty nearly the same place.

(Testimony of W. T. Douglas.)

Q. Did you find any of the Alaska Packers' Association Company's piles there when you got there?

A. No, sir.

Q. Did you see any piles at all? A. Yes, sir.

Q. How many? A. I think it was five.

Q. Anything stuck up on them? A. Yes, sir.

Q. What was it?

A. Well, there was a notice "J. T. Barron," I think.

Mr. JENNINGS.—I don't think that is cross-examination.

Mr. CHENEY.—That is going into a different matter. If he wants to call him for his own witness then he can go into it; not proper cross-examination.

Mr. WINN.—I want to find out about the condition out there. You examined him. [595]

Mr. CHENEY.—Asked him in regard to the tide. I didn't ask him anything in regard to the Alaska Packers' trap.

COURT.—I hardly think it is cross-examination, Judge.

Mr. WINN.—Well, I guess he has answered.

Mr. JENNINGS.—He has already answered. I object to going into it any further. He has answered.

Q. (By Mr. WINN.) I understand you helped drive the entire trap of Alexander—he had no piles in when you got there? A. No, sir, he did not.

Q. Well, now, in the driving of those piles for the trap did you examine at all just where to put them down and did you have to take some soundings or not before commencing to drive the trap?

(Testimony of W. T. Douglas.)

A. Well, I don't know whether he took any soundings at the time or not, but I think he started to drive it as near as he could as to where he originally had the old trap, the Alaska Packers' trap.

Q. Well, if he had made any soundings or not there you would have known of it, wouldn't you, Douglas?

A. Well, I think I would if I could remember it, but I don't remember.

Q. What was done—did you assist in driving the trap? A. Well, I was boom man on the driver.

Q. You were boom man on the driver—what does that man do?

A. Well, you get the piles alongside and get them ready to drive.

Q. And did he drive them right along or break off some and did he shift around and just find good driving right straight along?

A. Well, he found very good driving, some places they wouldn't drive as far as others. [596]

Q. You helped him to drive the trap and get it out to the condition it was in when you testified in this case on the motion to dissolve the preliminary injunction; you helped him over into that stage of the trap? A. I did.

Q. And he drove the lead of the trap there and all of the trap without any difficulty at all, that is, in the driving? A. Yes, sir, he did practically.

Q. Well, how was it—did you drive out on the lead of the trap at that time until you couldn't drive any further or did you quit before you reached that point? A. Well, if I remember right we quit.

(Testimony of W. T. Douglas.)

Q. And it wasn't because you couldn't drive any further?

A. No; I don't think that he tried to drive any further at that time, but if I remember right, it was hard driving.

Q. Hard driving? A. Yes, sir.

Q. While you was there with him and driving this trap up to that point did you do any sounding around the beach? A. No, sir.

Q. No sounding done at all? A. No, sir.

Q. Do you know why you stopped right there at that point driving?

A. Well, if I remember right, it was late at night or blowing or something that we left off driving.

Q. Well, why didn't you go back the next day and drive?

A. Well, that I don't remember like, whether blowing the next day or not. I know we laid nineteen days in Funter Bay with the driver though.

Q. After you pulled out from this place? [597]

A. Yes, sir.

Q. Well, I know, but when did you pull out from this place with the pile-driver, did you pull out just as soon as you got the trap driven in the manner you have stated? A. Yes, sir.

Q. You pulled out. Well, now, I asked you if you knew why you quit driving at that time there?

A. If I remember right, it started to blow and we had to quit.

Q. And that was the only reason you stopped?

A. Yes, sir.

(Testimony of W. T. Douglas.)

Q. Did you go back and help him—help him to fill out the lead to the place where it is now driven?

A. Yes, sir.

Q. Well, did you say it was a storm that caused you to stop there, Douglas?

A. I think it was, so far as I can remember, either a storm or else had to go in for the night; I don't just exactly remember whether it was a storm caused us to quit at that particular time or whether we went in for the night to Funter Bay.

Q. Well, had you been in the habit of running up to Funter Bay with your pile-driver every night?

A. Yes, sir.

Q. Every night with it? A. Yes, sir.

Q. During the whole time you drove your trap?

A. Yes, sir.

Q. How many days or nights were you driving your trap?

A. Well, that I don't remember; I know I was with Alexander a month during the time this trap was constructed.

Q. Well, you didn't anchor or stay in that place ever, not a solitary night, not one night? [598]

A. No, sir, I don't think we did.

Q. Now, then, when you went back to commence driving the remaining portion of this lead did you have any trouble in driving?

A. No, sir, if I remember right we found fairly good driving, some places they drove hard one pile and the next pile would drive good.

Q. Did you find any remains of the lead of the old

(Testimony of W. T. Douglas.)

Alaska Packers' Association Company's trap there while you was driving the remaining part of that lead? A. No, sir, did not.

Q. Alexander is the man that directed—had direction of the driving of the piles, did he, Douglas?

A. Yes, sir.

Q. And you simply obeyed orders in that respect?

A. Yes, sir.

Q. You didn't know anything yourself about the ground there, whether you could drive here and there anywhere, did you? A. No, sir, I did not.

Q. You didn't make any soundings?

A. No, sir.

Q. You left all that to Alexander? A. Yes, sir.

Q. And you just continued on driving that lead out in the line that it is now or was finally completed?

A. Yes, sir.

Q. Well, what made you stop where you did?

A. Well, I guess couldn't drive any further towards shore.

Q. Got to be hard driving there? A. Yes, sir.

Q. Well, now, were you there while he was fishing the trap last summer? [599]

A. I was there once while he fished it.

Q. Did he have his web extended out there beyond this last pile?

Mr. CHENEY.—You are going into something that is not proper cross-examination. I object to it.

COURT.—It isn't proper cross-examination.

Mr. WINN.—I am asking if he helped to drive the trap. I thought I could ask him anything about the

(Testimony of W. T. Douglas.)

driving of the trap, how much—that was passed over, your Honor, yes, sir.

Q. Now, you answered Mr. Cheney's question that that last pile in the lead was never on dry land while you were there. Did you take particular notice every time you were there to go out and see whether that pile was on dry land?

A. No, sir, I did not take particular notice to go out there and look.

Q. You didn't think it made any difference whether dry land or deep water, did you, Douglas?

A. No, sir, I did not.

Q. And you didn't pay any particular notice to that? A. No, sir, I didn't.

Q. Now, I will ask you, if the Court please, to get the record clear on it—I will ask you if you wasn't there and noticed during the summer that there was a cable attached to that last pile and run over on to the shore and that there was a web strung on that cable?

Mr. CHENEY.—I object to that.

Mr. JENNINGS.—Not cross-examination.

COURT.—Objection sustained.

Mr. WINN.—I will take an exception, your Honor.

Q. You were there while the trap was fishing, as I understand?

A. Yes, sir, I was there once. [600]

Q. Once. What month was that in?

A. I think it was some time the latter part of August, I don't just exactly remember the date.

Q. What were you doing there, Douglas; you

(Testimony of W. T. Douglas.)

weren't working for Alexander?

A. No, sir, I was working for the Tee Harbor Packing Company.

Q. In the same bay? A. No, sir.

Q. O, well, you just happened to go in there while working for the Tee Harbor Packing Company—is that it? A. Yes, sir.

Q. Only there once during the summer while fishing the trap? A. Yes, sir, that is all.

Mr. WINN.—That is all, your Honor.

Redirect Examination.

Q. (By Mr. CHENEY.) Mr. Douglas, what was the reason that you took the driver and went clear up to Funter Bay every night for nineteen days or during the night of nineteen days and during the time you were driving that trap.

A. Because I guess it wasn't a safe place to lay.

Mr. WINN.—I don't want any guessing about it. I move to strike his answer out.

Mr. CHENEY.—I have asked him what was the reason.

COURT.—A matter of guessing would not be of any information to the Court, if the witness knows of any reason—

Q. (By Mr. CHENEY.) What was the reason you went up to Funter Bay harbor for the night?

A. Well, I don't know; as near as I can tell,—of course, I wasn't handling the driver or handling the boats—but as near as I can tell, they run up there for harbor for the night; [601] didn't consider it safe to lay there with the driver.

(Testimony of W. T. Douglas.)

Mr. WINN.—I move to strike the answer out, your Honor; does not furnish any information; he said he wasn't in charge, and as near as he could tell they had to get out there to anchor there or some place else.

COURT.—I think it may stand. If you have doubt of his information you may inquire, if it becomes material; I don't think any part of it is material, and taking a lot of unnecessary time, gentlemen.

Q. Mr. Douglas, you don't know how many soundings Mr. Alexander made before he drove his trap—you were simply a pile-driver man that was taken out to drive these piles when he got ready to drive in last March? A. Yes, sir.

Mr. WINN.—Leading and suggestive, very leading.

Mr. JENNINGS.—What is he leading him to?

COURT.—O, proceed, gentlemen, proceed.

Q. (By Mr. CHENEY.) I say you don't know anything about how many soundings Alexander had made prior to the 8th of March when you went out there to drive the trap? A. No, sir, I don't.

Mr. CHENEY.—That is all.

Q. (By Mr. JENNINGS.) Mr. Douglas, just one question. Judge Winn dragged out of you that when you first went there there were five piles sticking up there. How far apart were these five piles?

A. Well, I don't know just exactly how many feet they were apart.

Q. Well, approximately?

(Testimony of W. T. Douglas.)

A. But I should say from between ten and sixteen feet apart.

Q. Were they up and down in Chatham Straits or laid in back?

A. Three of them in a row and two of them together like a [602] dolphin.

Q. Three in a row. How far from the shore now?

A. Well, I don't know just exactly how far from the shore but I can tell on the map or plat they have got there.

Q. Well, approximately, I don't want exactly just how far?

A. Probably three hundred and fifty feet, may be, from the shore.

Q. About three hundred and fifty feet from the shore—there were three piles—to where the nearest pile of the three in the row were, about the nearest to the shore? A. Yes, sir.

Q. Well, how far—how much farther out into deep water was the dolphin?

A. Well, they were a series, the piles was practically between ten and sixteen feet apart and the dolphin was the outside one.

Q. All right. That is all.

Mr. CHENEY.—That is all.

COURT.—Anything further, gentlemen?

Mr. WINN.—Nothing further.

COURT.—Call the next witness.

Mr. JENNINGS.—If the Court please, that makes the end of our case.

Mr. CHENEY.—I want to offer before we close, I

(Testimony of W. T. Douglas.)

want to introduce in evidence the same notice that was introduced on the last trial, given by Mr. Barker as agent for Mr. Barron there to Mr. Alexander. It is one of the exhibits. I think it is with Mr. Robertson.

Mr. WINN.—I would like to see it.

Mr. CHENEY.—Mr. Burton has seen it.

Mr. JENNINGS.—I would like to see it.

COURT.—The Court will be in recess until two o'clock this afternoon. [603]

2 o'clock, March 20, 1912.

Mr. WINN.—I want to call Mr. Birkinbine for a question or so whenever convenient to Mr. Cheney.

Mr. CHENEY.—Well, what for—cross-examination?

Mr. WINN.—Yes, one or two questions I want to ask him; I didn't even question him about it.

Mr. CHENEY.—All right.

[**Testimony of H. P. N. Birkinbine, for Defendant (Recalled).**]

H. P. N. BIRKINBINE, heretofore duly sworn, being recalled, testified further as a witness for the defendant.

Cross-examination.

Q. (By Mr. WINN.) Just one thing that I omitted to question you about, Mr. Birkinbine. You started to explain in answer to one of my questions about this method of calculating the distance by the use of your instrument and the stadium—you call it the stadium, isn't it? A. Stadia, yes.

(Testimony of H. P. N. Birkinbine.)

Q. Stadia? A. I didn't use any stadia.

Q. I want to ask you a question or so about that proposition. Now, let us see if I am right about this use of this stadium. You have a thing below here—

A. Rod, they call it, sir.

Q. Rod, you call it, yes—marked with what colors?

A. Red, black or white; the field is white.

Q. Yes. Then, you have a cross-piece, of course, on it something like you can slide up and down, do you not? A. Sometimes.

Q. Yes. Some of them have that?

A. Some of them have a round target. [604]

Q. Now, then, as I understand, maybe I am incorrect about it—suppose that I wanted to calculate the distance from here, say, down to B. M. Behrend's store? A. Yes, sir.

Q. Now, then, you would first send a man down to B. M. Behrends' store with that rod, wouldn't you?

A. Yes, sir.

Q. And you would remain back here with your instrument? A. Yes, sir.

Q. Now, just tell the Court what you would have that man down at the store do and what you would do in order to calculate the distance between here and B. M. Behrend's, by the use of your stadium without other instruments?

A. When I use the stadia for a distance as great as between here and B. M. Behrends' store I would have two targets on my rod and as is my personal habit—

Q. Yes?

(Testimony of H. P. N. Birkinbine.)

A. —I would first signal to him or maybe I would have an agreement with him to set his bottom target on one foot even.

Q. Now, what do you mean by the target, Mr. Birkinbine? A. This red and white target.

Q. Yes.

A. —The center of which is marked by the difference of color.

Q. Yes.

A. I would have him set that on one foot even, very likely, of course, we would not have things as clear in the field as they are and the bottom rod would not be visible because of underbrush, now, so I would have him set it on one foot even, then I set my instrument so that the lowest horizontal hair [605] crosses this target—the lowest horizontal hair that is visible in the telescope.

Q. That is, you mean your plane or horizontal plane would be looking between—you would make your instrument of that level? A. Yes, sir.

Q. That is all right.

A. Now, there would be one cross-hair here, say, that would be looking that way?

Q. Yes.

A. Then, I have him move the other target up the rod until the position of it coincides with the topmost cross-hair.

Q. Yes.

A. Now, my instrument, if this distance reads 7.83—

(Testimony of H. P. N. Birkinbine.)

Q. Yes. That is, now that is the distance on your staff.

A. That is the distance is the height of the top target.

Q. Yes.

A. Now, that would be 6.83. I have to subtract one foot. That would be six hundred and eighty-three feet from the focal distance of my lens. You see it—

Q. Yes.

A. —it is a very slight cross; I have to set one foot or twenty-five one hundredths to that; and in looking from here to B. M. Behrends' store you will notice that is not on the level; I have got then to calculate what the horizontal distance would be.

Q. Yes, I see. I meant providing things were all on a level. I didn't question you to take into consideration the hill, but, of course, if you were on a hill and another place was lower down you would have to make calculations to meet that condition? [606]

A. Aside from correcting for your focal length.

Q. Well, now, the real method of calculation and so far as mathematics is concerned is that you get what you call an isosceles triangle, you would have your angle, then that point there, you would have the base line, and you take up a mathematical calculation—calculate the distance in that way instead of using this, what is it, the rule? A. Stadia.

Q. —instead of the rule you went by. Haven't you some rule to go by that you indicated to the Court? Just now you did—technically, something

(Testimony of H. P. N. Birkinbine.)

there to multiply. Where did you get that rule from?

A. Well, I got the rule, I suppose it is theoretical; a man by the name of Stadia got up. It is common in engineering books.

Q. Well, do you know the mathematical principle that underlies such rule? A. The stadia?

Q. Yes, sir.

A. Yes. It is the case of the topmost hair line of an instrument and the bottom-most hair line of an instrument are set such a distance apart that the proportion of feet that read on a rod gives the distance—gives one one-hundredeth of the distance from your instrument; that is, of course, the hair lines have to be set very fine in order to bring that down because it is gotten on the focal theory that the further away anything gets the smaller it gets.

Q. Yes, that is true. But I want to know have you got a rule to go by, there must be some rule for that rule, some mathematical principle underlying this rule? A. This stadia rule?

Q. Yes. [607]

Mr. JENNINGS.—We object to this, if the Court please, as not cross-examination.

Mr. WINN.—Why, it is.

Mr. JENNINGS.—Just a minute; just let me state; Mr. Hill stated that he used triangulation and the stadia measurement, Mr. Birkinbine stated that he didn't use the stadia measurement, I asked Mr. Birkinbine whether the stadia measurement was under ban by the Department, he said "Yes," now,

(Testimony of H. P. N. Birkinbine.)

not why it is under ban. We never went into it and don't care anything about, and I think the cross-examination here is about—is examining this man on what stadia is and how it is defective and all about it, how and what is the underlying mathematical principle of the things I never went into and don't care anything about; the only thing that was gone into and drawn out, simply Mr. Hill first stated he made his measurement by triangulation and stadia, Mr. Birkinbine stating that he never used stadia measurements. I asked him whether the stadia measurement was under ban by the Department; he said "Yes"; now that is all.

COURT.—Well, it is fairly connected with that examination, Mr. Jennings, ought to find out why it is under ban.

Mr. JENNINGS.—He has not asked that question.

Mr. CHENEY.—What is the difference?

COURT.—Why isn't it accurate?

Mr. JENNINGS.—He asked him why the Department has put stadia measurement under ban.

COURT.—That isn't Judge Winn's question but it will bear on it.

Mr. JENNINGS.—That is the question he is going into.

COURT.—Yes. [608]

Mr. JENNINGS.—He can't ask him anything about why it was put under ban or what it was. I didn't ask Mr. Hill what the stadia was or anything of that kind. He simply said that part of his meas-

(Testimony of H. P. N. Birkinbine.)

urements were by stadia measurement and part by triangulation.

COURT.—That is true, Mr. Jennings, but the inference would be that the stadia measurement is not reliable.

Mr. JENNINGS.—All right; let him put Mr. Hill on the stand in his case in rebuttal and show that it makes no difference whether stadia or triangulation—I didn't ask this witness anything about it; that is part of his case not part of ours.

COURT.—No, I think it is fair cross-examination; if the witness says he knows no reason why it should be under ban or if it should be repudiated as a method of measurement why I think it is fairly cross-examination.

Mr. WINN.—I am not going very far with it.

COURT.—I don't know how material it is but I think it is fairly cross-examination.

Q. (By Mr. WINN.) Now, you understand the question, then. I am not going very much further with this, Mr. Birkinbine. A. Yes, sir.

Q. Just ask—I just want to get it in other words that triangulation—there is a great deal connected with surveying—in connection with that method of surveying and in fact all of your principles underlying, your surveying is figured out by geometry or trigonometry or some mathematical calculation?

A. Yes, sir.

Q. Now, there is some reason for all those rules, as I understand, that you have such a rule as you mentioned a while ago. Now, I will ask you if you

(Testimony of H. P. N. Birkinbine.)

know of the underlying rule [609] of mathematics controlling the calculation of the distances by this principle or method of surveying, that is of— A. By stadia?

Q. Yes, sir.

A. Well, I would say that stadia is merely a triangulation where your base line is the number of feet that you have measured on the rod between your two cross-hairs. Therefore, it is a triangulation system where your base line is one one-hundredth of the distance you wish to measure. As a rule, it is one one-hundredth. Some instruments may be different but I never heard of one anything except, Judge, for instance, one two-hundredth or one four-hundredth, will be the ratio of one to four hundred or one to two hundred, or even one to eight hundred. I believe I saw a hair line one time.

Q. Yes.

A. But in ordinary surveying. I had a position one time—

Q. That is the principle? A. Yes, sir.

Q. I don't care—

A. I had a position one time, wouldn't allow me to make a triangulation where my base line was less than one-quarter of the distance of the desired measurement as I was—

Q. I understand. I don't care about that. I just want the underlying principles, not the faults; we will get at the faults of the same—

A. It is a principle of triangulation, sir.

Q. It is a triangulation, isn't it?

(Testimony of H. P. N. Birkinbine.)

A. Focal triangulation.

Q. In other words, you can so arrange your instrument that you have the distance of the base line and then you have an angle that you make in your instrument to get your angle, [610] don't you?

A. Yes, sir.

Q. And then you can make of it an isosceles triangle and then you would calculate the distance on a mathematical principle as a perpendicular line going from your instrument and intersecting your stake at right angles; that is the old principle, mathematical principle, isn't it?

A. Yes, there will be a horizontal line and a perpendicular line.

Q. That is your method, anyhow, it is triangulation, having an angle and a base line, and what else, what else do you need?

A. A focal length of the instrument.

Q. Yes, sir. Well, then, from that there is a mathematical calculation can be made.

A. There is.

Q. That is the underlying principle of that theory?

A. Yes.

Q. Now, then, your other theory of triangulation is that you go in the first instance as you say you did and you put your instrument down on one point— A. Yes, sir.

Q. —and you look at your object—

A. Yes, sir.

Q. —and you say you get an angle?

A. Yes, sir.

(Testimony of H. P. N. Birkinbine.)

Q. And then you move on down and take a base line to another point looking at the same object and you take the angle, don't you? A. Yes.

Q. Now, then, if your base line in that case is short and your object that you are looking at is far away you would meet [611] with some trouble there, wouldn't you, you would want a pretty good size base line in order to calculate this distance accurately because this point up here at the sharper of your angles would be on that shore?

A. Yes, the longer the base line the better the job.

Q. Yes. Now, I will ask you if this method of surveying by this staff, taking the angle you have given, isn't thorough—it is used frequently in short distances? A. Stadia, you mean, sir?

Q. Yes.

A. Well, it all depends upon what kind of work and what kind of orders you are working under.

Mr. WINN.—That is all I want to ask you.

COURT.—Any redirect examination?

Redirect Examination.

Q. (By Mr. CHENEY.) Mr. Birkinbine, I don't know but what I misunderstood your answer to Judge Winn's question this morning in regard to your experience in the construction of wharves. I want to ask you if you meant to say that you had never had charge of the construction of a wharf?

A. No, I didn't mean to say that.

Mr. WINN.—Well, we admit he never testified to, your Honor—it has been covered two or three times—if it will shorten the record.

(Testimony of H. P. N. Birkinbine.)

Q. (By Mr. CHENEY.) Well, I will ask you now if I understood you never had the sole charge of the construction of a wharf from its beginning to its completion—that is your answer?

A. I think I did answer that, Mr. Cheney.

Q. Well, now, has anything occurred to refresh your memory on that—would you care to state anything in regard to whether [612] or not you had done so?

A. It does seem kind o' queer, Mr. Cheney, that I should have forgotten a little job I was on probably, I suppose, three weeks; it was off Vashon Island; I had complete charge of the locating and driving and building and completing a wharf and I was the sole man in charge. I had no one but the president of the company over me. I don't know how that escaped my memory, but it is a fact.

Q. That is in addition to what you said you had done on other work in different parts of the United States and Alaska?

A. Yes, just one of the jobs.

Recross-examination.

Q. (By Mr. WINN.) Well, then, in doing that, Mr. Birkinbine, you went and selected the spot yourself for the building of the wharf and made your soundings and ascertained the kind of bottom and did all that preliminary work, did you?

A. Yes, sir; all the instructions that my employer gave me was showing the limits of the tidal property that he had just purchased and requested me to find out the most feasible place for driving and there was a—a master of a boat around the Sound that went

(Testimony of H. P. N. Birkinbine.)

with me. I think he was the master of a boat, to— with regard to the navigability—to the navigating to the wharf; of course, I didn't know anything about that.

Q. So you would get the face right and things of that kind?

A. No; so to pick, I think, a place out that we wanted to have and such as that.

Q. And that was to where it would go and you also took steps to ascertain the kind of bottom it was, and so forth? [613]

A. Yes, I made some borings and then I examined it at low tide as best as I could; we made, I think, two borings with the drill just to see the penetration we would get.

Mr. WINN.—That is all.

Mr. CHENEY.—That is all.

COURT.—That is all, Mr. Birkinbine. Any other witness, Mr. Cheney?

Mr. CHENEY.—I want to introduce this notice that was served by Mr. Barker, the notice that Mr. Barker testified to that he served on Mr. Alexander in March of last year, March, 1911; it was introduced at the other trial of the case.

Mr. WINN.—Let me see it, Mr. Cheney. I have never seen it.

COURT.—Any objection?

Mr. CHENEY.—Well, Mr. Barker said he served this notice. I will call Mr. Barker just for a second. Will you come and look at this notice, Mr. Barker? [614]

[**Testimony of Fred Barker, for Defendant (Recalled).**]

FRED BARKER, heretofore duly sworn, being recalled testified as follows on behalf of the defendant.

Direct Examination.

Q. (By Mr. CHENEY.) Is that the notice, Mr. Barker, that you served on Mr. Alexander at the time you testified to in this case yesterday?

A. It is.

Q. That is the notice? A. That is the notice.

Q. I see it is directed to the Tee Harbor Packing Company, but it was served on Mr. Alexander, was it? A. Yes.

Mr. JENNINGS.—Says “Tee Harbor Packing Company or to whom it may concern.”

Q. (By Mr. CHENEY.) But I say it is the notice you gave to Mr. Alexander? A. It is the notice.

Mr. CHENEY.—We offer it in evidence.

COURT.—Any objection.

Mr. WINN.—No.

COURT.—May be received.

Q. (By Mr. JENNINGS.) That was served by authority of Mr. Barron or the Thlinket Packing Company—you had authority to serve that from your members? A. Certainly I did.

COURT.—It may be received. [615]

[Defendant's Exhibit No. 2.]

Barron v. Alexander—Defts. Ex. 2—R. E. R.
2d Trial—Barron vs. Alexander—Defts. Ex. 13—
Recd. in Ev. R. E. R.

THLINKET PACKING COMPANY.

Cannery at Funter Bay, Alaska.	SALMON BRANDS.
JAS. T. BARRON, Pres. & Mgr.	"SEA ROSE," High Grade Red
M. G. MUNLY, Secretary.	Alaska.
C. T. WHITNEY, Mgr. Sales Dept.	"TEPEE," Standard Medium Red.
	"BUSTER," "PESANT," "THLIN-
	KET." Best Grade Pink.
	"ARCTIC BELLE," Best Grade
	Chum. WE GUARANTEE OUR
	BRANDS.

Main Office:

Wells Fargo & Co. Building,
Portland, Ore.

Funter, Alaska, March 14th, 1911.

To the Tee Harbor Packing Co,

Its Agent, or To Whom It May Concern,

You are notified herewith, that, in event of your jumping any of our trap locations, you do so at your own peril. We intend to drive and fish all our locations this season, and will protect our rights at all hazards.

THLINKET PACKING CO.

By JAS. T. BARRON,
B. President. [616]

Mr. CHENEY.—If the Court please, we are ready to close our case with the exception of one matter. I want to put Mr. Alexander on and just confine the questions to certain allegations in the answer that he swore to in regard to the value of the trap, as to the cost of the construction of the trap, and

(Testimony of C. J. Alexander.)

the question whether he is a citizen or not, because I apprehend that some of the things might be material.

COURT.—Very well. Take the stand, Mr. Alexander.

Mr. CHENEY.—He has already testified upon it the other time. I am not going into the questions he testified to before at all.

**[Testimony of C. J. Alexander, for Defendant
(Recalled).]**

C. J. ALEXANDER, the defendant, heretofore duly sworn, being recalled, testified as follows on his own behalf:

Direct Examination.

Q. (By Mr. CHENEY.) Mr. Alexander, are you a citizen of the United States? A. I am.

Q. Over twenty-one years of age? A. Yes, sir.

Q. I will ask you when you—about when, if you remember, that you first examined this trap-site where your trap is now located with a view to building a fish-trap there?

A. For my usage, you mean?

Q. Yes.

A. Well, it was some time, as I remember, the latter part of November, 1910.

Q. 1910? A. Yes, sir.

Q. And you went there again, I believe you stated in your [617] examination, in January, 1911?

A. January, yes, sir, of 1911.

Q. And then the next time was the time you

(Testimony of C. J. Alexander.)

started to drive your trap, which was in March 19—
March 8, 1911? A. Yes, sir.

Q. And you went there before the 14th?

A. Well, I think, as I remember, I towed to Funter Bay on March the 8th, or it might have been March the 11th the first work we accomplished on the trap itself.

Q. Now, is your trap as you constructed it there in March, 1908, or 1911, as it exists to-day, over eighteen hundred feet from any fish-trap owned by the plaintiff or conducted by the plaintiff or by anybody else in Chatham Straits? A. Yes, sir, it is.

Q. Well, I will ask you if your fish-trap as constructed in March, 1911, and as changed by the driving of the extension on the lead and your web and your wire, your entire trap as it stood there last summer while you were fishing it, was, is entirely below the line of ordinary high tide of Chatham Straits? A. It was.

Mr. WINN.—Object to the question as leading and suggestive.

COURT.—Objection overruled.

Q. (By Mr. CHENEY.) And as it stands now without the web of this trap, is it in there below the line of extreme low tide? A. Extreme low tide.

Mr. WINN.—Same objection; leading and suggestive.

COURT.—Objection overruled.

Q. Did you get the answer, Mr. Reporter?

Reporter.—Yes.

Q. About—O, I will ask you; did you fish that trap

(Testimony of C. J. Alexander.)

at all during [618] the season of 1911? A. Sir?

Q. You fished during the season of 1911?

A. Yes, sir, I fished it during the fishing season of 1911.

Q. You expect to operate it this year?

A. Yes, sir.

Q. Well, I will ask you to state to the Court, approximately, the cost of the construction of that trap, as it was in the fishing season of 1911?

A. Why, my books show, as I remember, approximately six thousand dollars.

Q. I will ask you whether or not this place where your trap is located there in the navigable water of Chatham Straits is or is not a valuable fishing site, catching salmon—a fish-trap site?

A. Yes, sir; in comparison with other fishing contrivances of that kind it is considered a very valuable site.

Q. Well, Mr. Alexander, when you went there and you put this trap-site—built your trap,—well, I will ask you whether or not the uplands in front of the trap which is now called survey 804 was occupied by anybody, that is, with any kind of business buildings or cannery or anything of that kind?

A. Nothing visible; no, sir.

Q. I will ask you whether or not that the upland directly in front of your trap is in your opinion of any value for agricultural purposes or for any other purposes?

Mr. WINN.—Object to it as incompetent, irrelevant and immaterial, for any purpose of the case.

(Testimony of C. J. Alexander.)

COURT.—I don't see the materiality of it, Mr. Cheney.

Mr. CHENEY.—Well, probably might not be material to show whether it was valuable for agricultural purposes or not. [619] I am not clear on that myself. But it is certainly competent to show it was not occupied by anybody when he went there and built his trap.

COURT.—He has already testified to that.

Mr. CHENEY.—I didn't know.

Mr. JENNINGS.—If the Court please, it would have a bearing this way. Here is upland absolutely of no value to anybody, neither agricultural land nor timber land, nor of any value whatsoever; the only value of the location there at all is the water in front of it as a fish-trap site; as bearing upon any other use that Mr. Barron ever expected to put it to.

COURT.—The only reason that the testimony is excluded and considered by the Court immaterial, Mr. Barron hasn't himself testified it is valuable for agricultural purposes, and he has definitely described just what he intended it for, so the Court cannot assume it is valuable for agricultural purposes or that Mr. Barron intended to use it for such purposes unless he so states, and he has not so stated.

Mr. CHENEY.—Well, all right, your Honor. One reason I asked the question because we had alleged that in our answer, and I wanted to show that these questions about putting in the house, and so forth, that we alleged in our answer, that we have showed it in testimony. That is all.

(Testimony of C. J. Alexander.)

Cross-examination.

Q. (By Mr. WINN.) You consider that, then, Mr. Alexander a pretty valuable fishing site, do you?

A. I do; yes, sir.

Q. You alleged in your pleading, I believe, that approximately that you expected to realize from it annually, well, about ten [€20] thousand dollars a year?

A. Well, I alleged, I think, that my anticipation of it at that time, that that would reach that amount.

Q. Did you realize that last year?

A. Well, approximately.

Mr. JENNINGS.—Object to as not proper.

COURT.—He has already answered.

Mr. WINN.—I didn't understand what the answer was.

A. I said, approximately.

Q. And you have alleged that I think in your pleading, Mr. Alexander? A. Yes.

Q. Yes, sir. You didn't have any cannery yourself in connection with taking up this fishing site, did you? A. I didn't then; no.

Q. You have since included this fish-trap as an asset in a new company which has been organized and which you are the owner of part of the stock, haven't you?

Mr. JENNINGS.—Object to. It is irrelevant, immaterial.

COURT.—I don't think it is material, Judge.

Mr. WINN.—Well, I will take an exception, your Honor.

(Testimony of C. J. Alexander.)

COURT.—Yes, sir.

Mr. WINN.—I am going to ask you a question along that line now; I don't know what purpose they could put that to, of course, unless for the faith and if on good faith, your Honor, part of these questions may be material.

Q. Now, I will ask you if it is not a fact, Mr. Alexander—I withdraw that question—you went on this location first in November, 1910?

A. Why, first in 1910.

Q. What did you go there for then?

A. I went for the—for the purpose of looking it over, with the [621] purpose of putting a trap in the following year.

Q. What were you working for?

A. I was working for the Halibut Packing Company of Petersburg, a company in which I have a large interest.

Q. 1910? A. Yes, sir.

Q. Were you engaged in the fish business in 1910?

A. Yes, sir.

Q. What sort of fish business?

A. In the herring trade.

Q. Not in the salmon business?

A. Not in the salmon business; no, sir.

Q. You didn't go up there to look over this fishing site for herring?

A. No, no; it was with a view to fishing salmon.

Q. And you was connected, then, with a company at Petersburg?

(Testimony of C. J. Alexander.)

A. Yes, sir; connected with the Halibut Packing Company.

Q. Well, did you stay—remain with that company in 1911?

A. Why, yes, sir; we operated in 1911.

Q. You took up this fish-trap in 1911 solely for the purpose of selling the fish of it? A. Yes.

Mr. JENNINGS.—Object; irrelevant, incompetent and immaterial.

COURT.—He may answer that question.

A. Why, I sold the fish out of it, yes, sir.

Q. (By Mr. WINN.) You didn't have any cannery yourself? A. No.

Q. You didn't pack?

A. No, sir; I didn't locate it with a view of canning the salmon myself in 1911.

Q. But you have made arrangements since then by which you expect [622] if you use the trap to use the fish in your own cannery? A. Yes, sir.

Q. How many fish sites have you?

Mr. CHENEY.—I don't think that is material, if the Court please, and I object to it on that ground.

Mr. WINN.—They asked Mr. Barron that.

COURT.—No, I don't think it is material; if you had objected to it the Court would have excluded it. It don't make any difference how many other fish sites this man has.

Mr. WINN.—I didn't object to the question when Mr. Barron was asked about it.

COURT.—I don't see how that shows the good faith of this particular man.

(Testimony of C. J. Alexander.)

Mr. CHENEY.—I asked Mr. Barron about how many fish-traps or locations he owned and was ruled out.

COURT.—No, but some evidence to that effect was admitted, but the reason it was admitted was because it wasn't objected to. Might show that this witness had half a dozen; might show also that he hasn't shown good faith in reference to it. It wouldn't prove anything in regard to the questions.

Mr. WINN.—I think it is really important in view of some of those questions they drew out from Mr. Barron, but if your Honor views it that way, I will stop it right away.

Q. Now, then, Mr. Alexander, this is the first fish-trap you have owned in Alaska, isn't it?

Mr. JENNINGS.—Object to it, isn't cross-examination, and immaterial and irrelevant.

COURT.—I don't see the materiality of that, Judge Winn.

Mr. WINN.—Well, I will take an exception, your Honor.

COURT.—Yes, sir.

Q. You had fished this trap-site for the Alaska Packers' Association prior to taking it up yourself? [623] A. Yes, sir.

Q. Do you know whether they fished it in the year 1910? A. Why, no, they did not.

Q. When did they fish it last?

A. Fished it in 1908.

Q. And I believe that is the time you stated you drove a trap for them? A. Yes, sir.

(Testimony of C. J. Alexander.)

Q. And you worked for them that year?

A. Yes, sir.

Q. Now, Mr. Alexander, you knew that Barron was claiming this as a fish-trap site when you went in there and commenced to drive, didn't you?

A. In a way, I know that Mr. Barron and the Pacific American Fishing Company is claiming practically all the valuable fishing ground in Chatham and Icy Straits.

Mr. WINN.—Well, now, I move to strike out his answer, your Honor. This witness is volunteering this and he is doing it for a purpose.

Mr. CHENEY.—You brought the answer out and now you move to strike it.

COURT.—The question, Mr. Alexander, is with reference to this fish-trap, isn't anything you know about his claim, or if you know the merits of his claim to this.

WITNESS.—Well, the question again, Judge Winn.

Q. (By Mr. WINN.) Just read it over there; if you will answer my question? A. I will try to.

Mr. CHENEY.—I think he answered.

Mr. WINN.—Well, the Court has ruled he didn't.

COURT.—Yes, he answered the question finally, Mr. Cheney, and included other matters. [624]

Mr. WINN.—I move to strike out his answer, not being responsive.

COURT.—May be stricken.

Mr. CHENEY.—If the Court please, I think he has a right—he said in a general way he knows it.

(Testimony of C. J. Alexander.)

Now—he is simply explaining the way he knew it was that Mr. Barron and the Pacific-American Fisheries were claiming a great many such traps and the way they were claiming this; it is explanatory is all.

COURT.—That is not material at all.

Q. (Read by Reporter.) Now, Mr. Alexander, you knew that Barron was claiming this as a fish-trap site when you went in there and commenced to drive, didn't you?

A. I knew that Mr. Barron was one of the claimants of it, yes, sir.

Q. (By Mr. WINN.) You saw the sign stuck up on those piles with Barron's name? A. Yes, sir.

Q. When you went there? A. Yes, sir.

Q. Now, there could not have been any mistake, Mr. Alexander, about your knowing Barron was laying claim to that fishing site when you went out there to drive this there?

A. Why, there was no question in my mind, as I say, but what he was one of the claimants of the place with a view to building a fish-trap there.

Q. Yes, that is what I wanted to find out. Now, we have got an answer to that. A. I see.

Q. When did you first find that out?

Mr. JENNINGS.—Well, now, I think, if the Court please, that is immaterial and irrelevant, if the Court please, and not cross-examination. [625]

COURT.—I don't see how material it is. He may answer.

A. Why, I think I knew that he pretended to have some claim to this place as early as 1909.

(Testimony of C. J. Alexander.)

Q. Yes. You knew that soon after you left the service of the Alaska Packers' Association, did you?

A. I knew that he went there with his pile-driver and drove a pile or two about that time.

Q. That is what I wanted to find out.

A. Yes, sir.

Q. Now, you say that this trap cost in the neighborhood of six thousand dollars to put it in? It cost pretty nearly that much to rebuild it every year, won't it?

A. Well, the expense of building it this year wouldn't be as great, perhaps, by a thousand dollars, maybe, as it was last year.

Q. Now, when you answered six thousand dollars to the question as propounded to you by your attorney, you meant that meant after the trap was fully equipped for fishing? A. Yes, sir.

Q. Web and all? A. Yes, sir.

Q. Now, then, I wish you would state to the Court whether or not you had the cable that is stretched from the last pile in your lead closest to the shore, if that cable didn't run from some timbers or something set up making a kind of cross-bar and then went on back of that and was attached to something. Is that the way your cable was upon which your web was strung?

A. Yes, sir; the cable ran from the last pile over a pair of shears indicated as you have described and fastened to a boulder on the beach down near low-tide mark. [626]

Q. Now, this fastening to the boulder on the beach

(Testimony of C. J. Alexander.)

was above the line of ordinary high tide?

A. It was below the line of ordinary high tide, I am sure.

Q. You are sure of that?

A. I know it positively.

Q. Well, you heard Mr. Dudley and Captain Mason testify about that being on the upland?

A. I am not basing my answer on what Captain Mason or Mr. Dudley said.

Q. Well, if they testified to that they are mistaken about that.

A. They surely are if they testified above high-water mark.

Q. Now, you testified yesterday, Mr. Alexander, that Mr. Cheney had advised you in running that line out you could run it clear on out and attach it to the upland if you wanted to; didn't you state that?

A. Nothing to prevent it; he advised me so far as Mr. Barron's ownership was concerned at that time.

Q. Now, isn't it a fact, in pursuance to that advice, you went out there and did complete that line to your trap and did go out on his upland and attach this cable?

A. It wasn't at Mr. Cheney's advice that I put this addition to this trap that is the extension from the piles in shore, at all.

Q. Didn't you state yesterday it was on his advice that you considered running it out and putting it in?

A. I stated it was his advice that I could do it if I so wanted to, sir.

(Testimony of C. J. Alexander.)

Q. Well, you didn't do it, until after you got that advice from him, did you?

A. No, I didn't go to the ground. I wasn't upon the ground at all until after I had that advice given, after the service [627] of this injunction.

Q. Yes. Well, now, didn't you state yesterday to the Court—just answer this positively—if you didn't state to the Court yesterday that you did act upon the advice of your counsel after the hearing was had upon that motion to dissolve the preliminary injunction and you went out there and constructed this out the way you did?

A. It was partly upon the advice of my counsel, yes, sir. I should not have done it without some legal advice on the matter.

Q. Then, in the first instance, when you constructed your trap out there in the condition that you did construct and the condition it was in when you testified here in that hearing on the preliminary injunction, you at that time thought that you had no right to go out any further with that lead?

Mr. CHENEY.—We object to it, your Honor; at that time, wouldn't make any difference.

COURT.—That is not material. The question was where he had actually built to; doesn't make any difference what he thought.

Q. (By Mr. WINN.) You knew at the time the motion came up for a dissolution of that temporary restraining order that if your lead was extended into the shore the way it is now that it would obstruct the

(Testimony of C. J. Alexander.)

reaching of Barron's claim from the waters of Chatham Straits?

Mr. JENNINGS.—Object to it as not proper cross-examination and immaterial and irrelevant.

COURT.—He may answer that question.

A. No, can't say that I did.

Q. (By Mr. WINN.) Why didn't you construct that lead out there, then, before you got Cheney's advice on it?

A. Well, I explained to the Court—I think my testimony here [628] yesterday, that I ran into very hard substance at the termination of this row of piling that were driven there before the injunction was served on me and that, basing my opinion from it—from the end of the Alaska Packers' trap or where the Alaska Packers' lead was finished, and that it was as far as I would be able to continue this lead towards the beach.

Q. Well, but you knew that the Alaska Packers' Association Company's trap had a longer lead on it than you had on your trap then, didn't you?

A. Well, I testified, I think, that the Alaska Packers' trap as it was fished in 1908 wouldn't come within two hundred feet or over as near the shore as the one I have there at the present time.

Q. Well, just answer the question, if you didn't know that the Alaska Packers' Association Company's trap had a longer lead to it along virtually the same line your lead is now than your lead was at the time of the dissolution of the temporary restraining order in this case?

A. Well, I am under the impression that it was a

(Testimony of C. J. Alexander.)

little longer, Judge Winn, from the fact that I thought that the trap continued off there further, but I didn't think it was any longer on that end, that is, the eastern, in nearest the beach, than my lead would be at the time the restraining order was served.

Q. Just one more question, if the Court please; maybe I asked it before but I will submit it, anyway. Now, then, you did testify on that hearing before Judge Lyons that you had driven in your lead as far as to the shore as you can drive it, didn't you?

A. Yes, sir; I think the substance of my testimony was that.

Q. O, what proportionate part of the six thousand dollars would [629] you say would go to make up the web of this trap and what part the putting in of the piles?

A. Why, that is something I am very conversant with. Offhand, approximately—

Q. Approximately is all right.

A. —approximately, material would cost two thousand dollars for this trap, that is the material. Chains and iron, wire and everything in connection, without the piling for it, would cost something less than a thousand dollars, I should judge, which would make the cost of three thousand dollars. I was nineteen days; I would have that expense in the driving of it.

Q. That is all.

Mr. CHENEY.—Let him answer.

Mr. WINN.—I don't care anything about it.

COURT.—It isn't material, if counsel doesn't want it.

(Testimony of H. P. N. Birkinbine.)

Mr. WINN.—I don't want it. That is all.

Mr. CHENEY.—That is all.

COURT.—That is all, Mr. Alexander. Any further testimony, gentlemen, for the defense? [630]

[Testimony of H. P. N. Birkinbine, for Defendant (Recalled).]

H. P. N. BIRKINBINE, heretofore duly sworn, being recalled, testified further on behalf of the defendant:

Direct Examination.

Mr. CHENEY.—I would like to ask Mr. Birkinbine a question.

COURT.—Very well.

Q. (By Mr. CHENEY.) Did I ask you where the pictures on the beach were taken?

A. The large one or little ones?

Q. The little ones?

A. I think you asked me for the location of one of the little ones, I am not sure. You asked for a great many of them and I am not sure.

Q. Well, there is only two are not in evidence?

A. Yes.

Q. Well, I wasn't sure. One is marked Exhibit 12 and one is Exhibit 11. Exhibit 12 is 5a—No. 5a?

A. I think I can tell more—

Q. Just briefly, look at that and state where they were taken; that is all.

A. Possibly I could by taking the plat so I could know just the location.

Q. Yes, where is that plat? Now, if you will look at it right here?

(Testimony of H. P. N. Birkinbine.)

COURT.—You are referring now to Defendant's Exhibit 4, Mr. Cheney?

Mr. CHENEY.—Defendant's Exhibit 4.

Q. If you will point out so the stenographer can tell from what you say about where these pictures were taken.

A. No. 11, I think, is the one that I testified about before. I am not quite sure of the location, and now I do believe it was a [631] little below the average high tide line due south of the capital letter "E" in "South 79° 51' East," which is also a little southeast of corner No. 1, meander corner, and the picture looks east by a little north.

Q. All right; now, describe No. 12?

A. No. 12 is taken a little further to the east, probably twenty or thirty feet to the east than No. 11 was, maybe a little more than twenty or thirty feet, about under the figure "4" or "405.8 ft.," which is the distance on the western meander line. Is that located good enough?

Q. Of survey 804?

A. Of survey 804; and the picture looks—the direction of the camera is, well—is east by a little north. I can't give the exact direction in figures of course.

Q. Yes.

A. Let's see; that is one that shows—

Q. A big boulder. Well, just explain that. Finish your answer referring to this. But it is numbered—

A. Yes.

Q. —but Exhibit No. 12?

A. Exhibit No. 12 can be linked with Exhibit No.

(Testimony of H. P. N. Birkinbine.)

6 by the big boulder which is common to the two pictures.

Mr. CHENEY.—That is all, Mr. Birkinbine.

Cross-examination.

Q. (By Mr. WINN.) Let's see those two. Which was it? A. Right there.

Q. O, yes. On one of these I asked you this morning, didn't I, you remember?

A. Yes, sir, I think so.

Q. About that point out there. Now, this little one, I don't [632] believe I asked any questions about this one; I want to. I understand you to say you were out—that was taken, Mr. Birkinbine—

A. Point out on the map.

Q. I couldn't get up; Mr. Cheney and the rest of them were around. Tell me—explain to the Court and call the point out there so that Mr. Robertson can get it.

A. Now, I could fix it pretty good if I got a scale.

Q. Just approximately.

A. All right. Well, it is about southerly on the plat below the figure "4" of the distance on the west meander line of survey 804; the figure looks east by a little north.

Q. Is that—does that picture indicate what has been referred to here as a sandy beach, in your judgment? A. Yes, sir.

Q. Does it show at all?

A. Well, of course, Judge, the little picture doesn't show it all; it shows—

Q. About what proportion of the sandy beach

(Testimony of H. P. N. Birkinbine.)

would you say, that is, approximately, Mr. Birkinbine, I don't want these things figured out, just approximately—how much of this beach of that claim now does that picture indicate—can you tell?

A. Well, may I describe this point from the place the picture was taken. It shows the beach which is directly in front of the cabin and the beach in an easterly direction to within twenty feet of where the solid rocky bluff commences.

Mr. WINN.—Now, this question may not be cross-examination, your Honor, but I presume it is cross-examination on the other question of the case.

COURT.—Very well.

Mr. WINN.—That was brought out, but I haven't thought of it [633] before.

Q. Now, Mr. Birkinbine, in your judgment, wouldn't that point there, that point along there, everything else being equal, be the natural place for the construction of a wharf or landing place on this survey? A. No.

Q. In your judgment, it wouldn't?

A. No, sir, the picture shows the bedrock, which would very likely be a very difficult place to set a wharf.

Q. Well, now, let us see; how far does that picture extend out?

A. I don't know, sir; it may be possible to put a wharf out further and top that bedrock so that only one bent would hit it but hardly probable.

Q. You know in the construction of wharves that you weight the bents. Haven't you seen them setting on solid rocks or mud sills and out quite a dis-

(Testimony of H. P. N. Birkinbine.)

tance on the approach of the wharf?

A. I have seen whole wharves, Judge, built out that the piles were weighted, but they were very expensive.

Q. Yes. Now, all you know that would have to be done here in the way of construction of an approach to the wharf would be that between the line of ordinary high tide or—yes, ordinary high tide and the line of low tide, that part of the ground that you assume you could not drive any piles, you would have to weight it on the rocks or weight them on some kind of mud sills or blast it or something of that kind?

A. Yes, sir, for a distance of about two hundred and fifty feet.

Q. And there is a distance of two hundred and fifty feet between the line of ordinary high tide and the line of low tide? [634]

A. But very probably you would have to either weight the dock or blast holes to set the piles in.

Q. Now, when you told about building a wharf over on the east you didn't know anything about the shore line except at ordinary tide and at high tide; that is all you knew about the shore there?

A. Yes, sir, except I have seen on the bedrock there.

Q. You have seen on bedrock there?

A. Yes, sir.

Q. And how far did you estimate that the wharf can be built out on that line? Would an approach have to be built otherwise than by driving piles?

Mr. CHENEY.—You mean the east end?

(Testimony of H. P. N. Birkinbine.)

Mr. WINN.—Yes.

A. I answered that yesterday, Judge.

Q. Well, Mr. Cheney asked you about this. This is the first time I have cross-examined you on that subject.

A. Yes, sir, I will have to go out in the jury-room and get my scale.

Q. I don't care for the scale. Tell us approximately. A. It is pretty hard to guess.

Q. Approximately?

A. How much water do you want?

Q. Well, I say how much of the shore line there is there—I will ask you this question first: how much shore line is there between the line of low tide and the line of ordinary high tide—did you measure that?

A. How is that, sir?

Q. How much shore land is there between the line of ordinary high tide and ordinary low tide over on the east end of the survey?

A. That would have to be by square feet or acreage? [635]

Q. O, I mean when you go down from upon the upland.

Mr. CHENEY.—He means the distance.

A. The distance between ordinary high tide and ordinary low tide?

Q. (By Mr. WINN.) Yes.

A. O, it is one hundred feet.

Mr. CHENEY.—He means on this end.

A. Which end?

Q. (By Mr. WINN.) I mean over on here?

A. I beg your pardon.

(Testimony of H. P. N. Birkinbine.)

Q. That is what I am talking about now.

A. I beg your pardon; one hundred and twenty feet ordinary high and ordinary low.

Q. You have got two hundred feet?

A. No, sir; this is extreme low, Judge.

Q. O, you are taking ordinary and I say extreme low tide and ordinary high tide?

A. Extreme low tide and ordinary high tide—well, that is about two hundred feet—it is a hundred and eighty feet.

Q. You are simply estimating that, aren't you?

A. Yes, sir.

Q. But you testified this morning to the Court you didn't make any measurements and didn't pay any attention to this east side?

A. I said I paid attention down as low as the average low tide.

Q. Didn't you testify to the Court this morning these lines you ran out there you didn't take any particular notice of that side?

A. As far as down to the ordinary low tide I took elevations, Judge; I think that was what I testified to. It was my intention to, anyhow. [636]

Q. Well, I didn't understand you so. Let's see now, Mr. Birkinbine. I thought you said this morning that you didn't pay any attention to this east side, that you went out there to get data about this other side of the trap. Now, of the—what data did you get in this section of the tide lands in front of the easterly end of this claim?

A. I accurately obtained the topography of the shore line in front of that claim as—well, it is as

(Testimony of H. P. N. Birkinbine.)

accurate down to the approximate low average low tide as the other side is.

Q. Well, what did you do that for when you said this morning that you didn't make any examination over there because you thought all the examination you was called upon to do was on this other side of the trap?

A. That was with reference to the soundings.

Q. Yes. A. On the west side.

Q. Yes.

A. I supposed with reference to the soundings at that time; this is with reference to the topography of the shore, Judge.

Q. Did you go out there to ascertain whether--whether a wharf could be built out from the east end of that survey, Mr. Birkinbine?

A. No, it wasn't my intention of looking for a wharf site when I was there, no, sir.

Q. No. And so far as the building of a wharf at that end you didn't go out there for that purpose?

A. I didn't go out for that purpose but when I saw the bedrock my mind went to the interests of the man who was employing me, I would look on this side and see if I could see bedrock.

Q. See bedrock. You did observe, though, as between the line of [637] the fish-trap and the west-erly end of the claim as to whether it would be a good place to build a wharf in there? You examined into that, did you?

A. Well, I didn't go out for the purpose of that, no such purpose at all, but I examined into it after I got there.

(Testimony of H. P. N. Birkinbine.)

Q. Well, you got the data concerning that water-front along in there the same you did along the other side?

A. Yes, sir; that is, concerning the soundings in the water, not concerning the shore line. One shore line is as complete as the other.

Q. I see. Then what is the difference between, the difference from the line of high tide on the easterly end and the line representing extreme low tide and the distance between the same two lines on the other side?

Mr. CHENEY.—If you want to examine him let him get a scale.

Mr. WINN.—O, approximately.

Mr. CHENEY.—I would like to have him get his rule.

COURT.—Well, if counsel only wants it approximately I presume he won't need his scale.

A. Well, of course, it is approximate; we will get the distance between extreme high tide to extreme low tide on the east side of the claim.

Q. Yes.

A. Of a probable wharf-site on that side?

Q. I don't care about wharf-site; I haven't asked anything about the wharf-site; I was asking you to give me the distance.

A. In a due southerly direction then?

Q. Yes, sir.

Mr. CHENEY.—From what?

Q. (By Mr. WINN.) I asked it.

A. From extreme high tide to extreme low tide, two hundred and [638] sixty feet.

(Testimony of H. P. N. Birkinbine.)

Q. Well, now, what is it over on the other side? That is, just about the same distance from the eastern end line as you have measured this distance from—

A. Yes, sir; well, we will start from the extreme high tide?

Q. Yes.

A. And you want to go due south in the same direction?

Q. Yes.

A. As the other one was. We will measure from just below the location of pictures 3 and 4, which would fix the position of this point; why, high water—extreme low tide—just three hundred feet.

Q. Isn't much difference in those distances there. Now, you want the Court to understand, then, on the eastward, on the eastern end across this shore land that you have just testified concerning that you could drive piles?

A. I think it would be better driving, in my judgment, would be better driving from what I have seen.

Q. Well, now, you wasn't examining it in regard for a wharf-site and therefore you could not testify positively to the Court whether would be better driving on one side or the other?

A. You asked me, Judge, if I went there for the purpose of examining it for a wharf-site—

Q. Yes, but I say—

A. I did examine it for a wharf-site after I got there.

Q. O!

A. That is what I could see on the beach. Made a reconnaissance of it, if you wish to call it so.

(Testimony of H. P. N. Birkinbine.)

Q. Well, who told you to examine it for a wharf-site?

A. Why, Mr. Alexander told me that one contention in the suit was that they were going to build a wharf and so I thought [639] it was up to me to do what I could to the interests of my employer.

Q. But you don't want the Court to understand, Mr. Birkinbine, that you made such an examination there you could swear positively that the driving of piles would be any more difficult on one end than the other but just simply giving it as your judgment, do you?

A. I want the Court to understand that I have very reasonable ground for that judgment.

Q. I know. Do you want to swear positively this would be harder on one side to drive piles than the other, or is it your judgment? Now, which one do you want to swear to?

Mr. CHENEY.—Can't swear to anything more than his judgment.

Mr. JENNINGS.—Nobody has ever driven piles on either side.

Mr. WINN.—Well, now, help him all you can, gentlemen, and when you get through let him answer.

A. Well, of course, Judge, I had no diamond drill along with me.

Q. No, you didn't—you didn't do anything along to find out about the rock—how deep it was, how far have to drive in one place to get through it or how far in the other place, did you—just made an ex-

(Testimony of H. P. N. Birkinbine.)

amination of the surface of the ground?

A. I made a reconnaissance, as I have stated before.

Q. That is an examination of the surface of the ground— A. Yes, sir.

Q. —that you saw exposed, and that is the only examination you made now? A. Yes, sir.

Q. And that is what your view is based upon?

A. Certainly.

Q. Yes. That is all. [640]

Redirect Examination.

Q. (By Mr. CHENEY.) Mr. Birkinbine, I just want to ask one question. In addition to what you have stated to the Court that your judgment is based upon and the opinion you have given to Judge Winn, now, I will ask you that in answering the question whether he stated that the plaintiff's witnesses had sworn that the water was deeper in front of the east end of the claim than over on the west end of the claim, you took that into consideration in stating to the Court that you thought this would be the best site to build a wharf?

A. Yes, Mr. Cheney, I understood that question in two distinct divisions; first—

Mr. CHENEY.—We don't care for the answer again.

Q. As you took the depth of the water into consideration when stating this would be the cheapest and most economical and best place to build a wharf, in front of the east end, you took into consideration that he had stated that their witnesses had testified

(Testimony of H. P. N. Birkinbine.)

that the water was deeper over here than it was over there? A. I did.

Q. The difference in the lines as you have approximated them to Judge Winn is only something like forty feet in favor of the east side, that is of this—I say the way you have approximated here between these lines— A. Yes, sir.

Q. —would be about forty feet less over here?

A. Yes, sir.

Q. But if it is a fact that the water is much deeper over here then a wharf would necessarily be much shorter than it would over here where the water is shallower? [641]

Mr. WINN.—Same objection. I think he has answered two or three times.

COURT.—I think he has answered.

A. Of course, I would like to explain about the measurements if I might that I made for Judge Winn. These measurements were made in a due southerly direction—you can see where the rule was laying, in a due southerly direction from the position of the pictures 3 and 4.

Q. (By Mr. CHENEY.) Yes?

A. Would be no wharf-site because a logical site—I only found one site to the wharf—you would have to come out a little or go in to opposite the cabin in order to get the two sides of your wharf and therefore you have got to go out on an oblique angle which would make the distance longer.

Q. Make it much longer than three hundred feet which you have stated? A. Yes, sir.

(Testimony of H. P. N. Birkinbine.)

COURT.—Any further questions, Mr. Cheney?

Mr. CHENEY.—That is all.

Re-recross-examination.

Q. (By Mr. WINN.) You know nothing about the tides and the winds, whether or not one place would be a better place to land or anything of that kind?

A. I am not a steamboat man.

Q. You didn't take any of those things into consideration?

A. I know there must be a tide rip around the peninsula.

Q. But, I say, in answering the question of Mr. Cheney's about the proper place to build a wharf there, you didn't take these principles of navigation into consideration at all, [642] did you?

A. No, I took nothing into consideration but the topography.

Mr. WINN.—That is all.

Mr. CHENEY.—That is all.

COURT.—That is all, Mr. Birkinbine. Any other witnesses, gentlemen?

Mr. CHENEY.—We rest our case, your Honor.

COURT.—Any rebuttal, gentlemen?

Mr. WINN.—If your Honor will give us three or four minutes until I see Mr. Burton.

COURT.—Very well, gentlemen, take a recess for ten minutes.

After Recess.

Mr. WINN.—We rest.

COURT.—Let the record at this time show that the plaintiff also rests. [643]

Certificate.

United States of America,
 District of Alaska,
 Division Number One,—ss.

I, R. E. Robertson, do hereby certify that I am the Official Court Reporter for the District Court for the First Division of the District of Alaska; that the foregoing and hereto attached pages of typewritten matter, numbered from one to five hundred and fifty-eight, both inclusive, is a full and complete transcript of the extensions of my shorthand notes taken of the evidence adduced at the trial of said cause.

Dated at Juneau, Alaska, this first day of July, 1912.

R. E. ROBERTSON,
 Official Court Reporter. [644]

*In the District Court for the District of Alaska,
 Division No. One, at Juneau.*

No. 840-A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

Findings of Fact and Conclusions of Law.

This cause coming on for trial before Honorable Thomas R. Lyons, Judge of the above-entitled court, and the plaintiff having introduced all of his testi-

mony and evidence, and the defendant having introduced all of his testimony and evidence, and each party having rested his case, and the Court having heard the argument of counsel representing the respective parties, and the Judge stating that he desired to visit the premises in controversy and that he would thereafter file a written opinion in said cause, and it being stipulated and agreed in open court by the attorneys representing the respective parties, and concurred in by the Court, that it would be unnecessary to render or offer Findings of Fact or Conclusions of Law herein until the Court had filed its written opinion, and now that the Court has filed its opinion herein, comes now the plaintiff and tenders to the Court for its making, signing and filing herein, the following Findings of Fact and Conclusions of Law:

I.

The Court finds that the plaintiff herein, James T. Barron, is now and has been for a good many years last past, the President and General Manager, and largely interested in [648] a corporation, known as Thlinket Packing Company, which said corporation has been engaged in the canning of salmon at Funter Bay, Alaska, and operating thereat a large salmon cannery, having a capacity of about 3,000 cases per day, and in order to supply said cannery with fish and salmon for canning purposes, said corporation owns a great deal of floating stock, fish-boats and boats propelled by steam and gasoline, fishing gear, fish-traps, fish-trap sites and fishing stations.

II.

The Court further finds that on or about the 10th day of March, 1911, the said plaintiff purchased of the Alaska Packers' Association, a corporation engaged in the fish business in Alaska, that certain trap-site theretofore located and fished by the said Alaska Packers' Association, situated on the west coast of Admiralty Island on Chatham Straits, an arm of the North Pacific Ocean, at a point between Funter Bay and Hawk Inlet, and about four miles distant in a southeasterly direction from said Funter Bay, and about four miles distant from the cannery owned by the said Thlinket Packing Company, and located on the shore land and in a small harbor and sheltered place for steamers, gasoline boats and other water crafts used in the fishing business, and said fish-trap site was conveyed to this defendant by good and sufficient instrument in writing.

III.

That prior to June, 1909, one V. A. Robertson, located and had surveyed, under the Soldier's Additional Homestead laws, applicable to the District of Alaska, a certain piece or parcel of shore land and upland, lying and being, and abutting upon the said harbor or cove wherein said fish-trap [649] was located, on the south shore of Chatham Straits, a navigable arm of the North Pacific Ocean, and abutting upon said fish-trap site, which this plaintiff purchased from the said Alaska Packers' Association, which said piece or parcel of land so surveyed is known and designated as U. S. Nonmineral Survey No. 804, and contains 5.27 acres; that said survey

soon after it was made was approved by the Surveyor-General, as is by law required, and the said Robertson commenced proceedings for obtaining a patent to the ground contained therein.

IV.

The Court further finds that on or about the 1st day of March, 1911, the said V. A. Robertson, for a good and valuable consideration, conveyed to this plaintiff by good and sufficient deed in writing all of the ground and premises contained in the said Non-mineral Survey No. 804; and this plaintiff continued with diligence the said patent proceedings before the U. S. Land Office at Juneau, Alaska, and such proceedings were had in said Land Office that before the trial of this cause final entry and proof had been made before said Land Office and a Final Receiver's Certificate issued to this plaintiff for the lands embraced in said survey. That the purchase of said fish-trap site and said ground contained in said Survey No. 804 was all made by this plaintiff prior to the defendant initiating or making any claim to said fish-trap site or shore lands, or uplands, and plaintiff now is, and was at the time of the commencement of this action, the owner of all the lands embraced in said Survey No. 804.

V.

That by reason of plaintiff's ownership of the lands embraced in said Survey 804, he is entitled to the exclusive right of ingress and egress between his upland and over the shore land and tide lands to the navigable waters in [650] said harbor and Chatham Straits, and is entitled to such access to said waters free and unobstructed, and from all points

of the said upland contained in said Survey No. 804.

VI.

That said fish-trap site and ground contained in said U. S. Survey No. 804 were acquired by the plaintiff for the purpose of being used in connection with said fishing business of said Thlinket Packing Company; that during each year the said cannery at Funter Bay is operated, and it is necessary to have a great many piles, piling and timbers for the purpose of building fish-traps and keeping up of said cannery, and wharf in connection with it, and maintaining the same; it is also necessary each year, by means of said steamers and gasoline boats, to tow said piling and fish to supply said cannery, great distances, and most of said piling is obtained at a place on the uplands in a southerly direction from Funter Bay, down Chatham Straits, passing said land contained in U. S. Survey No. 804, and cove or harbor abutting thereon, and said harbor is necessary for this plaintiff to have and the same has been used by plaintiff for shelter and mooring place for his steamers and gasoline boats engaged in said towing business in connection with said cannery, and the waters in front of and abutting upon said Survey No. 804 is particularly adapted for said purpose, and the only place in which said plaintiff can seek shelter from northerly winds in the towing of said piles and fish to said cannery from points south of said harbor or cove, and the water in said harbor and the shore land abutting thereon and abutting upon said Survey No. 804 were used for said purpose long prior to the defendant making any claim thereto and are neces-

sary for said use and purpose on account of the prevailing winds during [651] the time that the said towing has to be done.

VII.

That prior to March 14, 1911, and prior to any pretended claim made to said premises by the defendant, the plaintiff had entered upon the fish-trap site and waters immediately in front of U. S. Survey No. 804, and caused several piles to be driven and a notice placed thereon that said plaintiff owned said fishing-trap site and station, and the said defendant with full knowledge of said facts, and with full knowledge of plaintiff's rights and uses of said harbor, and ownership of said upland, did, by his agents and himself, and employees, enter upon the shore land and tide land and waterfront property immediately in front of, and abutting upon the ground contained in Survey No. 804, and the waters contained in said harbor, against the will and consent of this plaintiff, and commenced the driving of piles, and the construction of a fish-trap at a point indicated upon the blue-print or map attached to the Amended and Supplemental Answer herein by the words "Alexander Lead Line, Mar. 28th, 1911," which said blue-print or map is hereby referred to for all purposes of these findings and made a part of the same; that immediately upon said defendant entering upon said premises, as aforesaid, this plaintiff ordered said defendant from said premises, informing him of the ownership of said upland and fully explaining to said defendant plaintiff's rights in the premises, and the notice and piling of plaintiff

were at said time in place and position as above referred to, where they could easily have been seen by defendant; that notwithstanding said fact, the said defendant did continue driving piles immediately in front of the premises of this plaintiff, and the plaintiff applied to this court for a temporary restraining order against [652] said defendant, which said restraining order was granted, and thereafter on motion of said defendant and a showing that was made by said defendant that he did not intend to construct his fish-trap so that the lead thereof would come any nearer the upland of plaintiff's than the point indicated on said blue-print by the bunch of piles opposite the words, "Alexander Lead Line, May 28th, 1911," and that said fish-trap was then completed, the Court dissolved said temporary restraining order. But thereafter, the said defendant returned to said premises and continued the driving of the lead to said trap and completed the same 261 feet further in shore towards plaintiff's upland, along a line which is indicated on the said blue-print above referred to, by the row of piles along the words "Extended 261 ft. in shore," and further continued said lead from the end nearest the shore to the upland of the plaintiff by means of a strong wire cable and the hanging thereon of webbing so as to complete said lead, and the same was completed as indicated on said blue-print, thus interfering with and obstructing plaintiff's right of free access from his upland to the navigable waters of Chatham Straits, and his right of ingress and egress to and from his said upland.

VIII.

That the construction and maintenance of said fish-trap by said defendant has obstructed, and does obstruct, plaintiff's access to the navigable waters of Chatham Straits from his upland, and has completely cut off access to his shore land from the navigable waters abutting thereon, and the using of that particular part of the shore land which plaintiff had been using prior to the construction of the said fish-trap by [653] said defendant; and the maintenance of said fish-trap does entirely cut off and prevent plaintiff from reaching navigable waters from all that part of his shore line which lies between the prolongation of the line of the lead of said trap and the westerly boundary of plaintiff's premises contained in Survey No. 804, which said last mentioned portion of shore land is best adapted for the purpose of reaching said upland and has been used, together with the water in front thereof in said harbor, for said purpose as well as for the purpose of anchoring and mooring plaintiff's steamers and gasoline boats while towing logs, piles and fish; that the construction and maintenance of said fish-trap by said defendant has and does render said harbor useless for the purpose which said plaintiff had heretofore been using the same and renders plaintiff's upland useless and valueless, and destroys all of plaintiff's waterfront property and shore land which he could erect upon or maintain a wharf, or could use for anchoring boats and other water crafts, and has completely destroyed said harbor and the utility thereof.

And as Conclusions of Law, the Court concludes from the foregoing findings, as follows, to wit:

I.

That the plaintiff is now, and has been for a long time prior to defendant initiating any right thereto, the owner of the fish-trap site, shore land and uplands contained in U. S. Survey No. 804, all of which are described in the Amended and Supplemental Complaint herein, and entitled to the possession thereof, and each and every portion thereof, as against said defendant or anyone claiming under him.

II.

By reason of the ownership of the lands contained in [654] U. S. Survey No. 804, bordering and abutting upon the navigable waters of the harbor in front of same, a part of Chatham Straits, plaintiff is entitled to free and unobstructed access to and from all points of his upland, across shore lands in front thereof, to and from said navigable waters, that by construction and maintenance of the fish-trap set out and described in the Amended and Supplemental Complaint herein by defendant, the said access of plaintiff is cut off and destroyed, and that the maintenance of said fish-trap by defendant, the said access of plaintiff is cut off and destroyed, and that the maintenance of said fish-trap by defendant constitutes a nuisance as well as destroys the usefulness of the harbor abutting upon plaintiff's upland.

III.

That the plaintiff acted timely and with diligence in applying to this Court for injunctional relief

against the construction and maintenance of said fish-trap by the defendant, and plaintiff has no speedy and adequate remedy at law herein and is entitled to a mandatory injunction requiring said defendant to remove said fish-trap and obstruction from said waters and shore land in and upon which said fish-trap is constructed, and a decree may be prepared accordingly.

Done in open court this —— day of ———, A. D. 1912.

_____,
Judge.

[Endorsed]: No. ——. In the District Court for the District of Alaska, Division No. 1, at Juneau. James T. Barron, Plaintiff, vs. Claire Alexander, Defendant. Findings of Fact and Conclusions of Law Requested by Plaintiff. John R. Winn, Newark L. Burton, Attorneys for ———. Office: Juneau, Alaska. Office No. ———. Filed Jun. 28, 1912. E. W. Pettit, Clerk. By H. Malone, Deputy. [655]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 840-A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

Motion for New Trial or Rehearing.

Comes now the above-named plaintiff, James T. Barron, by his attorneys, Winn & Burton, and moves the Court to set aside the opinion and decision heretofore rendered in this cause and grant a new trial or rehearing herein for the following causes materially affecting the substantial rights of the plaintiff, to wit:

I.

The Court erred in that part of its opinion and decision wherein it held that the evidence showed that all of the structure or fish-trap complained of in the complaint was constructed below low-water mark, for the reason that all evidence showed to the contrary and that the defendant himself admitted that part of the structure extended out, in and over the shore lands in front of plaintiff's land to or above the line of high-water mark, and all of the other evidence in said cause showed that part of said structure extended above said high-water mark and in, upon and over the upland of said plaintiff.

II.

That the Court erred in that part of its decision and opinion wherein it held that plaintiff was able, notwithstanding [656] the structure or fish-trap, to reach all points of his upland from deep water for the reason that such finding is against the uncontradicted evidence and the admission of the defendant while he was testifying upon the witness-stand during the trial of said cause. The Court further erred in that part of its opinion and decision wherein

it stated that the plaintiff did not need a wharf, for the reason the same is against the evidence, and further, the same is a matter of immateriality, whether plaintiff had needed a wharf to reach the deep navigable water in front of his land before the erection of the trap in question, or not. That said right is appurtenant to and a part of said property right belonging to said plaintiff by reason of his ownership of the upland and that the need or necessity of the same is entirely immaterial.

III.

The Court also erred in that part of its opinion or decision wherein it stated that since the hearing or trial of said cause, the Judge of this court visited and viewed the situs of the fish-trap and uplands referred to in the complaint, and by reason of the condition of the premises, etc., at said time, all possible question in the judgment of the Court had been eliminated in reference to said structure interfering with plaintiff's right of access from every point of his upland to navigable waters of Chatham Straits, for the reason that at the time the Court visited the premises, the evidence of the original structure or the fish-trap and the manner in which it was constructed as complained of in the complaint had been altered and changed, and the knowledge gained of the situation by reason of the Court's visit to said property could not be used as a basis of a finding against said plaintiff, and is a means of depriving [657] the plaintiff of his property or property rights without due process of law and without the plaintiff having had his day in court.

IV.

The Court also erred in that part of its opinion or decision wherein it in substance found and held that the plaintiff, by reason of his upland ownership, was only entitled to reasonable access to his upland property from the navigable waters of Chatham Straits or entitled to reasonable ingress to and from his upland to navigable water of Chatham Straits.

V.

Irregularity in the proceedings of the Court and abuse of the discretion of the Court by reason of the Judge thereof visiting the premises in question and using the knowledge gained thereby for the purpose of predicated a finding as against the property and property rights of the plaintiff, all of which prevented plaintiff from having a fair trial, and, in fact, the Court should have treated the actions of the defendant in destroying the condition that the trap was in at the time of trial, and the changing thereof, as a confession against said defendant, and a confession that the way that the trap was originally constructed, did prevent free ingress to and from the upland of plaintiff to the navigable waters of Chatham Straits.

VI.

Accident and surprise materially affecting the substantial rights of the plaintiff which ordinary prudence could not have guarded against.

VII.

Insufficiency of the evidence to justify the opinion or decision of the Court and that the same is against law. [658]

VIII.

Error in law occurring at trial and excepted to by the plaintiff.

WINN & BURTON,

Attorneys for Plaintiff.

Due service of a copy of the within Motion for New Trial or Rehearing is admitted this 7th day of May, 1912.

Z. R. CHENEY,

Attorney for Defendant.

[Endorsed]: Original. No. 840-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. James T. Barron, Plaintiff, vs. Claire J. Alexander, Defendant. Motion New Trial or Rehearing. John R. Winn, Newark L. Burton, Attorneys for ————. Office: Juneau, Alaska. Office No. ————. Filed May 7, 1912. E. W. Pettit, Clerk. By J. J. Clarke, Deputy. [659]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 840-A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

Notice.

To the Above-named Defendant, Claire J. Alexander, and R. W. Jennings and Z. R. Cheney, His Attorneys:

You, and each of you, will please take notice that the motion for new trial herein or rehearing and setting aside the Findings of Facts and Conclusions of Law made by the Court, a copy of which is hereto attached and served upon you, will be called up for hearing on July 2d, A. D. 1912, at ten o'clock in the forenoon of said day, before the above-entitled court or the Judge thereof, at the courthouse in Juneau, Alaska.

WINN & BURTON,
Attorneys for Plaintiff. [660]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 840-A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

Motion for New Trial or Rehearing.

The Court having made, rendered, signed and filed herein its Findings of Facts and Conclusions of Law, comes now the above-named plaintiff, James T. Barron, by his attorneys, Winn & Burton, and moves the Court to set aside said Findings of Fact and Conclusions of Law and grant a new trial or rehearing herein, for the following causes materially affecting the substantial rights of the plaintiff, to wit:

I.

The Court erred in making that certain finding,

wherein it held that the evidence in said cause showed, and the Court so found, that all of the structure, or fish-trap, including lead, etc., complained of, was and is constructed below low-water mark, for the reason that all of the evidence and testimony of witnesses in said cause shows the contrary, and that the lead of said trap extended above the line of ordinary high tide, to and upon the upland of this plaintiff, and that said finding made by the Court is entirely unsupported by the evidence, and, in fact, that there is no evidence to support the same. [661]

II.

That Finding of Fact No. III, made, rendered, signed and filed herein by the Court, is entirely unsupported by the evidence, the defendant having acknowledged himself upon the witness-stand that access to a large portion of plaintiff's land from the navigable waters of Chatham Straits was cut off and obstructed by said fish-trap, and that said fish-trap did interfere with the free ingress to and egress from said land to said navigable waters; that there is no evidence to support said finding, and the same is contrary to law.

III.

That the Conclusions of Law made by the Court are not supported by the Findings, and that there is no evidence of said cause to justify said Conclusions.

IV.

Irregularity in the proceedings of the Court, and abuse of the discretion of the Court, by reason of having visited the premises in controversy, on its own motion, and using the information thereby obtained

as evidence in said cause, and predicating a finding thereon against this plaintiff.

V.

Accident and surprise materially affecting the substantial rights of the plaintiff which ordinary prudence could not have guarded against.

VI.

Insufficiency of the evidence to justify the Findings made by the Court, and the same are against law.

VII.

Error in law occurring at trial and excepted to by the plaintiff.

WINN & BURTON. [662]

United States of America,
District of Alaska,
Division No. 1,—ss.

I hereby certify that I received the within Notice on the 1st day of July, 1912, at Juneau, Alaska, and that I served the same on the 1st day of July, 1912, at Juneau, Alaska, by delivering and leaving a full, true and correct copy of said notice to Mrs. R. W. Jennings, she being the wife of R. W. Jennings, attorney for the within named defendant, Claire J. Alexander, the said R. W. Jennings being out of the city of Juneau, Alaska, and the said notices delivered to the said Mrs. R. W. Jennings at the usual place of abode of R. W. Jennings and she being over the age of 21 years of age, personally and in person.

Dated at Juneau, Alaska, July 2, 1912.

H. L. FAULKNER,

United States Marshal.

By Hector McLean.

Office Deputy.

[Endorsed]: No. 840-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. James T. Barron, Plaintiff, vs. Claire J. Alexander, Defendant. Notice and Motion for New Trial or Rehearing. John R. Winn, Newark L. Burton, Attorneys for Plff. Office: Juneau, Alaska. Filed Jul. 2, 1912. E. W. Pettit, Clerk. By _____, Deputy. [663]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 840-A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

Affidavit of Jno. R. Winn.

United States of America,
District of Alaska,—ss.

Jno. R. Winn, being first duly sworn, on oath deposes and says: That I am one of the attorneys for the above-named plaintiff, and have been such since the inception of said case, and was present, aided and assisted in the trial of said cause from the beginning to the close thereof; that some time after the plaintiff and defendant had rested their case, and after the introduction of all testimony and evidence in said cause, Honorable Thomas R. Lyons, the Judge of the above-entitled court, and who presided over the trial of said cause, announced in open court, of

his own accord, and without any request of the plaintiff, and in presence of the attorneys representing the defendant, that he, the said Judge of said Court, expected to file a written opinion in said cause, but before doing so would visit the fish-trap site and upland set out and referred to in the complaint herein. That some time thereafter, and before the Judge of said Court filed his written opinion herein, he visited said premises and affiant was present at said time and accompanied [664] said Judge on his trip, and when we arrived at the fish-trap location and upland referred to in the complaint herein, the said defendant was upon the ground with several men, pile-driver and gasoline boat and had destroyed the evidence of, and the manner in which the fish-trap described and set up in the complaint herein was constructed, and was engaged in constructing another fish-trap immediately in front of the shore land and upland of plaintiff.

This affidavit is made and filed herein, to be used upon the hearing and in support of the motion to set aside the Findings of Fact and Conclusions of Law made, rendered and filed herein by the Court.

JNO. R. WINN.

Subscribed and sworn to before me this 2d day of July, A. D. 1912.

[Seal]

NEWARK L. BURTON,
Notary Public for Alaska,

Filed Jul. 2, 1912. E. W. Pettit, Clerk. By
———, Deputy. [665]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 840-A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

Affidavit of Jno. R. Winn.

United States of America,
District of Alaska,—ss.

Jno. R. Winn, being first duly sworn, on oath deposes and says: That I am one of the attorneys for the plaintiff in the above-entitled cause and assisted in the trial of said cause from its inception to its close; and that I make this affidavit for the reason that the plaintiff herein cannot be reached in time to perfect this appeal before the leaving of Honorable Thomas R. Lyons, Judge of said Division No. One, Alaska, for the Westward, and hence an affidavit cannot be procured signed by said plaintiff; and that by reason of affiant's long residence in Alaska and familiarity with property and property rights of the kind in litigation in this suit, I am able to state the value thereof is more than the sum of Five Hundred Dollars (\$500), and the property and property rights which plaintiff has been denied herein by the action of the Court in rendering its final judgment or decree and in making its final order herein, and in not granting plaintiff's prayer of his complaint is a denial of

relief for and in excess of \$500.00 in value, and [666] the upland of plaintiff is worth more than \$500.

JNO. R. WINN.

Subscribed and sworn to before me this 2d day of July, A. D. 1912.

[Notarial Seal]

NEWARK L. BURTON,
Notary Public for Alaska.

Filed Jul. 2, 1912. E. W. Pettit, Clerk. By
_____, Deputy. [667]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 840-A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

Opinion.

This is an action in equity to restrain the defendant from constructing a fish-trap in front of land alleged to be owned by the plaintiff.

The complaint alleges that the plaintiff is the owner and in possession of 5.27 acres of land abutting on the tide waters of Chatham Straits, an arm of the North Pacific Ocean; that some time in the year 1901 one V. A. Robertson caused said tract of land to be surveyed and thereafter such survey was approved by the Surveyor-General for the District of

Alaska, and subsequently thereafter the said Robertson sold and transferred all his right, title and interest in and to said land to the plaintiff herein; that plaintiff thereafter filed his application for patent to said tract of land in the local land office at Juneau, in the District of Alaska, and sought to procure patent from the United States thereto by means of soldier's additional homestead warrant; that no protest has been filed against said application for patent; and that said patent proceedings have been prosecuted to a final conclusion and there remains nothing further to be done by the officers of the Interior Department to transfer the title to said premises from the United States to plaintiff, except the ministerial [668] act of issuing patent thereto. The complaint further alleges that defendant commenced driving piles on the tide lands immediately in front of said tract of land for the purpose of constructing a fish-trap; and that defendant has by reason of driving said piles cut off plaintiff's right of access from his upland to the navigable waters of Chatham Straits; and that, unless restrained by this Court, defendant will continue to further drive piles in the completion of said fish-trap and entirely destroy plaintiff's access to the highway.

The defendant on information and belief denies the plaintiff's ownership of the tract of land described in the complaint; and admits that he has built and is building a fish-trap in front of said upland, but alleges that all of such fish-trap is below low-water mark; and denies that his structure or fish-trap in any way interferes with plaintiff's right of access

from his upland to the navigable waters of Chatham Straits; and he further alleges that he acquired his interest in and to the fish-trap site prior to plaintiff's alleged acquisition of the tract of land described in the complaint.

The reply puts in issue the affirmative defense set out in defendant's answer.

Messrs. WINN & BURTON, Appearing for Plaintiff.

Z. R. CHENEY, Esq., and R. W. JENNINGS, Esq., Appearing for Defendant.

LYONS, District Judge:

In the view the Court takes of the case as presented by the pleadings and the evidence, it may be conceded that plaintiff is the owner and entitled to the possession of the tract of land described in the complaint. It may further be conceded [669] that his right, title and interest thereto was initiated at the time that his grantor caused a survey of the same to be made in the spring of 1909, and that his grantor and himself prosecuted the patent proceedings described in the complaint with reasonable diligence.

The only questions, therefore, necessary to be determined in order to adjudicate the rights of the parties hereto are:

First, What right has plaintiff in the tide lands or the space between his upland and navigable waters?

Second, Is the defendant interfering with such rights in any manner?

The owner of land abutting on navigable water has by virtue of such ownership no right or posses-

sion or title to the tide land in front of such upland holdings, since the United States holds the title to all tide lands in Alaska in trust for the future state, or states, that may be hereafter carved out of and organized in this territory. But such upland owner enjoys the right of free access from his land to deep water navigation; thus affording him uninterrupted means of ingress to and egress from his holdings to the highway. The law, therefore, subjects the tide lands to the will of an abutting upland owner to the extent only of enabling the latter to control the same for the purpose of securing an easement from his holdings to the navigable waters bordering upon his upland.

“But whether the title of the owner of such lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among these rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public subject to such general rules and regulations as the legislature may see fit and proper to impose for the protection of the rights of the public, whatever those may be.”

Yates vs. Milwaukee, 77 U. S. 497.

“The riparian right is property and is valuable and though it must be enjoined in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which when once vested

the owner [670] can only be deprived in accordance with the established law and if necessary that it may be taken for the public good upon due compensation."

Yates vs. Milwaukee, *supra*. To the same effect, see Pacific Coast Company vs. McCloskey, 160 Federal, 794; Decker vs. Pacific Coast Company, 164 Federal, 974; Columbia Canning Company vs. Hampton, 161 Federal, 160; Dalton vs. Hazelett, 182 Federal, 561.

It will be conceded, therefore, that it is the settled law of this jurisdiction that one owning land abutting on navigable water has a right of free access from such abutting premises to the highway. But what is meant by the right of free access from such upland to deep water navigation? Counsel for the plaintiff earnestly insist that the littoral and riparian rights of the upland owner give him the privilege of preventing anyone from building any structure or in any way occupying any portion of the space between his upland and the highway, regardless of whether or not the same may in any way interfere with reasonable access from his upland to deep water and without reference to whether or not he has any need or any desire to appropriate the same premises to any beneficial use.

Section 3 of an act of Congress, entitled "An act for the protection and regulation of the fisheries of Alaska." approved June 26, 1906, provides:

"That it shall be unlawful to erect any dam, barricade, fence, trap, fish-wheel or other fixed or stationary structure except for purposes of

fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than 500 feet or within 500 yards of the mouth of any red salmon stream where the same is less than 500 feet in width, with the purpose or result of capturing salmon or preventing or impeding their ascent to their spawning grounds, and the Secretary of Commerce and Labor is hereby authorized and directed to have any and all such unlawful structures removed or destroyed.”

Unless, therefore, a fish-trap comes within the denunciation of the section of the statute just quoted, it is a legal institution under the laws of the District of Alaska and entitled to the protection of the law the same as any other legitimate industry. There is no contention made here that the construction [671] of the fish-trap where located is within the inhibition of the section of the statute last quoted. It is the policy of the law to encourage legitimate industry and commerce, and wherever the right which any person enjoys under the law may be exercised without interfering with the right of another, the law prevents such interference by compelling both parties to observe the limitations necessary in order that both may successfully enjoy the privileges and advantages which the law secures to each. If, therefore, the only right which the upland owner enjoys in the tide lands in front of his upland holdings is the right to pass over the same, why should he be permitted by the law to insist that all the premises between his land and deep water

remain unoccupied and unproductive, unless such condition is necessary in the protection of his littoral or riparian right.

The United States holds the tide lands of Alaska in trust for the future state, or states, which may be erected out of this territory and the upland owner as against the United States can only insist upon his right of free access to deep water. It, therefore, cannot be successfully urged that the United States would not have the right to erect any structures on the tide land in front of an upland owner, providing such structures would not interfere with the upland owner's right of ingress and egress to and from his premises to the highway. It follows that the only right which the upland owner holds which cannot be taken from him against his will, except by condemnation proceedings, is his easement which provides a passageway from his land to deep water. By what course of reasoning can it be held, therefore, that a private individual maintaining and operating a legitimate industry in front of the upland owner's holdings, which does not conflict or interfere with [672] the latter's access to deep water navigation, should be restrained from operating such industry at the instances of the upland owner when the latter's rights are not infringed by reason of the existence of such industry?

The facts in this case are almost identical with the facts in *Re Columbia Canning Company vs. Hampton, supra*. It is true in that case the plaintiff did not allege that the fish-trap of the defendant was interfering with the former's right of access from

his upland holdings to navigable water, but his complaint did allege that the defendant's fish-trap was constructed on the tide land immediately in front of his upland holdings. But our appellate court held in that case that the complaint was insufficient to state a cause of action. The defect in the case, however, could not have been cured by merely alleging that the plaintiff's access was cut off by the maintenance of defendant's structure, unless the evidence in the case actually proved the truth of such allegation. If plaintiff's contention in this case were tenable, the Court would have held the complaint in the Hampton case sufficient, for in that case the complaint did show that the structure erected by defendant was on the tide land in front of plaintiff's upland holdings. It is apparent from the evidence that the principal object of plaintiff in securing title to the tract of land described in the complaint was to enable him to control the fishing site in front of such upland. It is true, as the plaintiff says, he may be able to use and probably can use such upland for other purposes, but it is apparent from plaintiff's own testimony that his main purpose in securing title to such property was to enable him to hold the frontage for the purpose of erecting a fish-trap and enjoying the sole right to fish by any stationary appliance between his upland and deep water navigation. However the pleadings in this case [673] may differ from the pleadings in the Hampton case, it is obvious that the object of both suits is the same, to wit, to enable the plaintiff to enjoy exclusive fishing rights in front of

his upland holdings.

In *Re Decker vs. Pacific Coast Company*, *supra*, Judge Morrow, after quoting from *Shively vs. Bowlby*, 152 U. S. 1, used the following language:

“This is the general rule and is designed to keep navigable waters free and open to the public for commerce and navigation and at the same time permit the littoral owner and those engaged in commerce and navigation to have access to navigable water, but it cannot be ascertained from the allegations in the complaint in this case, nor does it appear in evidence, in what manner the maintenance of the buildings and wharf by the appellee in front of appellant’s premises prevents her from having access to the navigable waters of Gastineau Channel. The presumption is that such access would be facilitated rather than obstructed by the maintenance of a wharf and other suitable structures for the accommodation of the public in the discharge and shipment of passengers and merchandise arriving and departing by water at the port of Juneau.”

The language quoted is incompatible with the theory of the plaintiff that no structures may be maintained on the tide land in front of the upland owner’s premises against his will. Nor is the holding in the *Decker* case in any manner in conflict with the holding in *Re McCloskey vs. Pacific Coast Company*, *supra*, wherein the Court held that the littoral owner had a right of access to the navigable waters in front of his land and from every part

thereof. It doesn't follow because the littoral owner has a right of access from every point of his land to navigable water that he can insist on proceeding from every point in a course at right angles to his shore line. Nor does the opinion in *Re Dalton vs. Hazelett*, *supra*, in any way conflict with the views herein expressed, for in that case the lower court found as a fact that the structures of the defendant did interfere with the right of access of the littoral owner to navigable water, and the bill of exceptions having been stricken there was nothing for the Appellate Court [674] to consider excepting the allegations of the bill and the findings of the Court, and the complaint alleged and the trial court found as a fact that the structures of the defendant interfered with the plaintiff's right of access from his upland to navigable water.

“The plaintiff had erected an oyster-house in a tidal river opposite the defendant's villa lots. The defendant tore it down before it was used, claiming that it obscured the prospect, obstructed the access and injured the value of his lots. It did not appear that the water-way to the lots had ever been used: Held, that the defendant's action was unjustifiable.”

Bowden vs. Lewis, 43 Am. Reports, 21.

In *Re Taylor vs. Commonwealth*, 47 S. E. Rep. 875, at page 881, the Court said:

“In the case before us the property of the plaintiff is used merely for farming purposes. There has not been erected and so far as the record discloses there is no purpose to erect any

pier or wharf. She is engaged in no business requiring such access to the channel of the stream as cannot be fully enjoyed consistently with every right which the state has exercised or which it has delegated to others. The commonwealth holds as trustee a vast body of land covered by the flow of the tide, precisely as in the case before us, for the benefit of her citizens. It is not only her right but her duty as such trustee to render this property productive. Is it reasonable that the commonwealth holding title to the soil is to be wholly subordinated in the use of it to the use with which another is clothed merely by virtue of being the owner of adjoining soil when the rights of each and all can be fully protected without diminution and without hindrance? If the time should come when the river front of the plaintiff shall be divided into lots whose owners find it necessary to their profitable ownership to erect piers and wharves upon them, if they engage in business which shall require exclusive access to the channel of the stream, it may be that a case could then be presented more meritorious than that which we have under consideration, and in the light of changed conditions the Court may be again called upon to consider the respective rights of the riparian owner and those remaining in the commonwealth, or which have been granted to others. The property in dispute was originally leased by the state as an oyster planting ground, but since in the prosecution of that

industry mineral water was discovered far beneath the soil which has proved of great value. There may be other and more valuable substances hidden in the soil. As to that conjecture would be idle. But whatever that soil contains belongs to the State, and the State and it alone has the right to develop its hidden resources of wealth, if such there be, for the common benefit of all its citizens."

In *Re Ferry Pass Inspectors & Shippers' Association vs. White River Inspectors & Shippers' Association*, 22 L. R. A. [675] (N. S.) 345, at page 350, the Court said:

"While the complainant and the defendant in common with all other inhabitants of the State have a right to use the waters of a navigable stream and the lands thereunder, including the shore or space between high and low water mark, for purposes of navigation and the transportation of logs thereover, neither the complainant nor the defendant has such right to the exclusion of its lawful exercise by the other or by any other inhabitant of the State. If the defendant in fact so uses the water or the land thereunder, including the shore, as to deprive the complainant of all access to the river from its lands or to its lands from the river, or to injure the complainant in the use and enjoyment of his riparian land or the business thereon, the defendant may be enjoined from a continuance of such wrong; but the complainant has no exclusive right to use the water or shore for its

business. If the defendant obstructs the mere right of navigation with no special injury to the complainant's riparian property, the remedy is by public officials. The prayer of the bill of complaint appears to contemplate the enforcement of an exclusive right of the complainant to the use of the waters and shore opposite its land for the conduct of its business; and as the complainant has no such exclusive right, the particular and entire relief as prayed should not be granted. There may, however, under the allegations of the bill of complaint be properly granted some relief against the total exclusion of the riparian owner from access to his lands and the demurrer should not have been sustained."

In *Re Barnes et al. vs. Midland R. Terminal Company*, 85 N. E. Rep. 1093, at page 1096, the Court said:

"It is necessary, therefore, to give the condition in the patent its reasonable and obvious meaning, and when that is done it matters but little whether the defendant rests upon its letters patent or upon its legal right as a riparian owner. The result in either case is the same and the peculiar language of the statute is referred to only because the referee in one of his findings emphasizes the fact that the defendant had constructed its pier a year or two before it obtained its letters patent. It is enough to say that either as littoral owner or by virtue of its letters patent the defendant had the right to

construct and maintain a pier that was reasonably adapted to the purpose for which it was primarily intended, that was to provide a means of passage from the upland to the sea. To the extent that the reasonable exercise of this right necessarily interfered with the right of the public to pass along the shore the former was paramount and the land was subordinate; and the logical corollary to that proposition is that just in so far as the attempted exercise of the littoral or riparian right passed the prescribed boundaries of necessity and reason, the conditions were reserved and the right of passage along the afore-shore or remained the paramount right. That is so because a littoral or riparian owner in his capacity as such acquires only those rights in the afore-shore which are necessary to enable him to make a reasonable use of his upland; and the principal attribute of such use is access to and egress from the open water. The defendant, therefore, had the right to erect and maintain a pier for the purpose of connecting its upland with the sea just so far as it was a necessary [676] consequence of the reasonable exercise of that right to obstruct the afore-shore and thus to limit the free and convenient passage of the public. The defendant's rights are superior to all others save those reserved to Congress and the state legislature. To the extent that the defendant has transcended these bounds the rights of the public remain unaffected."

In *Re Hedges vs. West Shore R. Company*, 44 N. E. Rep. 691, at page 693 the Court, among other things, said:

“The owner of the banks and shore could not so exercise his right of passage or access to the channel as to destroy or unreasonably interfere with the right of the sovereign to put its own land to such use as it thought proper. Where two such rights or interests exist with respect to the same portion of the earth’s surface each must be exercised and enjoyed in a reasonable way; each right or interest in such a case is always subject to the qualification that it cannot be exercised or enjoyed in such a way as to destroy the other. * * * The owner of the uplands cannot exercise his easement or right of access to the channel in such a way as to prevent other parties to whom the sovereign has granted the bed of the river or some portion of it from using their own property in a reasonable way. The rights of the parties in these respects are governed by the general rules of law applicable to easements and servitudes generally.”

See, also, an unpublished opinion by this Court in cause No. 398 (*Valdez*), *Low et al. vs. Katalla Company et al.* Counsel for the plaintiff strenuously insist that the holding by this Court in the *Katalla* case, *supra*, is in conflict with a long line of decisions by the Alaskan courts with reference to the rights of the littoral and riparian owner, and cite *Juneau Ferry Company vs. Alaska Steamship Company*, 1 Alaska, 553; *Lewis vs. Johnson*, 1 Alaska, 529; *Car-*

roll vs. Price, 81 Federal, 137; United States vs. Roth, 2 Alaska, 257; Sutter vs. Heckman, 1 Alaska, 81.

In *Re Juneau Ferry Company vs. Alaska Steamship Company*, *supra*, it is true this Court held that the owner of the uplands and shore line has a right to pass out over tide lands to deep water, subject to the rights of navigation and commerce, and while such principal is not in conflict with the views expressed herein yet on appeal in that case, in the opinion reported in 121 Federal, 356, our Appellate Court held that there was no question of riparian ownership involved. The question was as to whether or not the plaintiff had such a possession [677] in the tide land as would enable him to maintain ejectment. In modifying the holding of the lower court, Judge Ross said on page 357, among other things:

“The suit being one in equity we must deny the privilege; and we are of the opinion that while the evidence undoubtedly shows that the complainant and its predecessors in interest used the strip of waterfront in controversy from time to time, yet it falls far short of establishing such possession thereof on the part of the complainant as would justify the injunction prayed for. It is still clearer that there was no evidence of any ownership of the premises in question by the defendant to the suit and, therefore, that portion of the decree adjudging defendant the owner thereof is erroneous. The appropriate decree in view of the evidence is one to the effect that the complainant take nothing by its suit and dis-

missing the bill at complainant's costs."

The lower court apparently took the view that the defendant by reason of being the upland owner enjoyed the right to the possession of all the tide land in front of him, but the Appellate Court refused to concur in that doctrine.

In the case of *Lewis vs. Johnson, supra*, if the opinion recites all of the facts pleaded, it is clearly in conflict with the holding of our Appellate Court in *Columbia Canning Co. vs. Hampton and Decker vs. Pacific Coast Company, supra*.

In *Re Carroll vs. Price, supra*, the littoral rights of riparian owners are not discussed, but the case deals with possessory rights on tide land.

With reference to the case of the *United States vs. Roth, supra*, I think it will be conceded that the doctrine announced in that case was clearly overruled by the two cases last cited. In that case the Court held that the upland owner had constructive possession of all of the tide lands in front of his holdings, and, therefore, that one who erected a tent on such tide land was guilty of criminal trespass. However, under the holdings of our Appellate Court it seems unnecessary at this time to cite any authorities to show that the upland owner has no possessory rights whatever in the tide lands in front of him.

In *Re Sutter v. Heckman, supra*, the trial court held that [678] the owner of the upland by virtue of his riparian and littoral rights acquired the possession to a certain piece of tide land in front of him by virtue of such littoral and riparian rights. On appeal our Appellate Court, while affirming the de-

cision of the lower court, refused to adopt the theory of the lower court, but affirmed the case on the ground that the plaintiff and his predecessors in interest were in the possession of the tide lands in controversy on May 17, 1884, and had held continuous possession of the same until the commencement of the suit, and for that reason such possession was protected by section 8 of an act providing a civil government for Alaska and for other purposes, approved May 17, 1884, 23 Stat. L. 24. It is true the Appellate Court quoted at length from the opinion of the trial court, not for the purpose of approving the principles of law announced therein, but as a means of ascertaining the facts therein recited, and in commenting on such quotation from the opinion of the trial court, Judge Ross said, on page 88:

“We are of the opinion that the decree may and should be affirmed without reference to the theory upon which the Court below proceeded.”

And on motion for rehearing, in 128 Federal, 393, the Appellate Court reaffirmed its former ruling and based the affirmance of the decree on the ground of continuous possession from May 17, 1884, until the time of the commencement of the action; thus holding that the act of May 17, 1884, which protected Indians and other persons in their possession of lands until future legislation by Congress should enable them to acquire title thereto, protects such persons in possession of tide lands as well as these in possession of uplands.

After a careful and critical review, therefore, of the opinions of this Court, regarding the question of

littoral rights, it is reasonably obvious that where in conflict with the holding in the Katalla case they have been overruled by [679] the cases of the Columbia Canning Company vs. Hampton and Decker vs. Pacific Coast Company, *supra*.

In *Re Coburn vs. Ames*, 52 California, 385, at page 398, the Court said:

“Assuming as we do for the purposes of this decision that the riparian owner is entitled to wharf out to deep water, it is clear, we think, that this right is in the nature of a franchise or privilege to be exercised or not by him at his election. He may never see fit to avail himself of the privilege; and it cannot be pretended that while declining to avail himself of his right to wharf out, he is nevertheless entitled to the possession of the land below high-water mark on the theory that at some future time he may possibly change his mind and desire to erect a wharf. On this theory he might capriciously refuse to erect a wharf at a point where all the convenience of commerce demand it and might prevent others indefinitely from engaging in the enterprise. A theory which works this result cannot and ought not to be upheld. On the contrary, giving to this right of the riparian owner its widest scope and latitude, it amounts only to this: that if he desires to wharf out and is unlawfully obstructed in the exercise of the right, he may maintain an action for damages and, if the obstruction amounts to a public nuisance, it may be abated by appropriate proceedings for the purpose. If

it only be a private nuisance which obstructs him in the exercise of his right to wharf out, he may possibly cause it to be abated by the appropriated method. But he has no such title or right to the possession of the bed of the ocean as will enable him to maintain ejectment.

“In this state there are numerous large land estates held in private ownership which front for many miles on the shore of the ocean and on navigable bays and inlets within the ebb and flow of the tide; and if the doctrine were tolerated that each of these proprietors, while himself declining to erect and maintain the docks, piers and wharves which are necessary for the convenience of commerce, nevertheless in virtue merely of his riparian rights might maintain ejectment for all such structures erected by others, which when recovered he might either demolish or cease to use in aid of commerce, it is not difficult to foresee the disastrous consequences which would result from such a doctrine.”

If the doctrine contended for by the plaintiff in this case were adopted as the law in the District of Alaska a few individuals could secure title to all upland abutting on all the waters containing all the available trap-sites within the District of Alaska and thereafter enjoy a perpetual right to erect fish-traps immediately in front of such upland, and if any other person should attempt to erect such a structure, could stay such attempt by injunctional proceedings although [680] such structures or traps may not in any way prevent the upland owner from reaching

navigable water. The language last quoted from the California case portrays clearly the evil results which would follow were the plaintiff's contention with reference to the rights of littoral and riparian owners upheld in this jurisdiction.

The upland owner unquestionably has a right to wharf out from his premises, as is held by our appellate court in *Dalton v. Hazelett*, *supra*, but he merely enjoys that right for the purpose of improving or providing an access to navigable water; but in case he has no desire or no reason for erecting a wharf or pier why should the law permit him to interfere with another who desires to maintain a legitimate and productive industry in front of his upland, particularly when the same does not in any manner interfere with a reasonable right of access which he enjoys by virtue of being the owner of the lands abutting on navigable water?

Assuming, therefore, in accordance with the views herein expressed that the upland owner merely enjoys under the law a reasonable right of access from his upland to navigable water, the second question involved, to wit: Whether the defendant's fish-trap interferes with such right? will next be considered. The evidence shows that all of the structure is below low-water mark and, while there is considerable conflict with reference to the feasibility of the plaintiff's being able to reach all points of his upland from deep water, a careful review, however, of the testimony will disclose the fact that for any purpose to which the land of the plaintiff can be appropriated, under his testimony, he will have no difficulty whatever in

reaching such premises from the navigable waters of Chatham Straits. If he desires to build a wharf, such wharf can be built under the testimony from either the west or the [681] east side of the premises. But there is no testimony which warrants the Court in assuming that the plaintiff needs or will construct a wharf to such premises at this time, unless he can by injunction compel the defendant to remove his fish-trap so that plaintiff may erect one in its place and stead. The plaintiff admits in his testimony that he desired to build a fish-trap in about the same place as the defendant has erected his, and that if the defendant's fish-trap were not in existence he would probably construct one in the same place. Such fish-trap if constructed by plaintiff would evidently interfere with his right of access to his upland to the same extent that the defendant's structure obstructs such access. Since the hearing of this trial, however, the Judge of this court in company with counsel for both the plaintiff and the defendant has had an opportunity to visit the situs of the fish-trap and the tract of land described in plaintiff's complaint, and it appears that the lead line of the defendant's trap has been changed so that, instead of running in a northeasterly direction from the main part of the trap, as indicated by the exhibits offered in evidence, it now extends in a direction a little west of north from the trap, thus eliminating any possible question in the judgment of the Court of its interfering with plaintiff's right of access from every point of his upland to the navigable waters of Chatham Straits.

For the reasons herein assigned this action should be dismissed. Let findings of fact, conclusions of law and decree be entered in accordance with this opinion.

Given in open court at Juneau, Alaska, this 4th day of May, 1912.

THOMAS R. LYONS,
Judge. [682]

[Endorsed]: Form No. 680. No. 840-A. In the District Court of the United States for the Div. No. 1, of Alaska. James T. Barron vs. Claire J. Alexander. Opinion. Filed May 4, 1912. E. W. Pettit, Clerk. By H. Malone, Deputy. [683]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 840-A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

Certificate and Order Settling Bill of Exceptions.

The above and foregoing Bill of Exceptions hereto attached was presented to me on this 2d day of July, A. D. 1912, in the time allowed by the order and rules of this Court; and the same having been examined by me, and by the Court:

NOW, THEREFORE, I, THOMAS R. LYONS, the Judge before whom said cause was tried, do hereby settle and allow the same as a full, true and

correct Bill of Exceptions herein, and do order the same filed as and made a part of the record herein; and I do further certify that said Bill of Exceptions contains a full, true and correct transcript of all the testimony and evidence introduced or offered at the trial of said cause, together with all of the exhibits and on which the same was heard.

Done in open court this 2d day of July, A. D. 1912.

THOMAS R. LYONS,

Judge.

[Endorsed]: No. 840-A. In the District Court for the District of Alaska, Division No. 1. J. T. Barron vs. Claire Alexander. Bill of Exceptions. Filed Jul. 2, 1912. E. W. Pettit, Clerk. By _____, Deputy. [684]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 840-A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

Stipulation [for Transmission of Original Exhibits.]

IT IS HEREBY STIPULATED AND AGREED by and between counsel representing the above-named plaintiff and the above-named defendant, respectively, that the following original exhibits may be sent to the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California,

as a part of the plaintiff's Bill of Exceptions, viz.:

Plaintiff's Exhibits marked "A," "B," "D" and "E" (also marked "C").

Defendant's Exhibits marked 5, 6, 7, 8, 9, 10, 11, 12, 3 and 4.

Dated July 24th, 1912.

WINN & BURTON,
Attorneys for Plaintiff.

Z. R. CHENEY,
Attorneys for Defendant.

Filed Jul. 24, 1912. E. W. Pettit, Clerk. By
_____, Deputy. [685]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 840-A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

Order [Directing Transmission of Original Exhibits].

Stipulation signed by counsel representing the above-named plaintiff and the above-named defendant, respectively, agreeing that plaintiff's original exhibits marked "A," "B," "D" and "E," and defendant's original exhibits numbered 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12, be sent to the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, as a part of plaintiff's bill of exceptions; and the

Court being fully advised in the premises,—

IT IS ORDERED, that the plaintiff's original exhibits "A," "B," "D" and "E," and defendant's original exhibits 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 be forwarded as part of plaintiff's Bill of Exceptions to the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

Done in open court this 24 day of July, A. D. 1912.

CORNELIUS D. MURANE,
Judge.

O. K.—Z. R. CHENEY,
Atty. for Defendant.

Entered Court Journal, No. 1, page 334.

Filed Jul. 24, 1912. E. W. Pettit, Clerk. By
———, Deputy. [686]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 840-A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

Stipulation [Omitting Form of Application of Soldiers' Additional Homestead from Transcript of Record, etc].

It is hereby stipulated and agreed by and between counsel representing plaintiff and defendant, respectively, in the above-entitled cause, that that certain form of Application of Soldiers' Additional

Homestead mentioned and referred to in the order of above-entitled court dated July 2d, 1912, not having been offered in evidence in the above-entitled cause and not being an exhibit therein and no part of the record on appeal herein, be omitted from the Transcript of the Record on Appeal;

It is further stipulated and agreed that Defendant's Exhibit No. 13, being a letter from Thlinket Packing Company, by James Barron, President, dated March 14, 1911, be made a part of the Record on Appeal.

Dated August 1st, 1912.

WINN & BURTON,
Attorneys for Plaintiff.

Z. R. CHENEY,
Attorney for Defendant.

[Endorsed]: Filed Aug. 1, 1912. E. W. Pettit,
Clerk. By ———, Deputy. [687]

[Plaintiff's Exhibit "C."]

Barron vs. Alexander—Plff's Ex. "C"—Rec'd in
Ev.—R. E. R.

For proof of claim, see application of Andrew Wigeby, of Shelby, Montana, assignee of Richard J. Whitten, filed at Great Falls, Mont., for SE. $\frac{1}{4}$, SW. $\frac{1}{4}$, Sec. 31, T. 32 N. R. 1 E., M. M., 40 acres.

United States Land Office,

Juneau, Alaska.

Serial No. 01472

Filed Aug. 30, 1911. M.

Receipt No. 4675

C. B. Walker, Register.

Assignment by Assignee.

Whereas, Richard J. Whitten, who made original homestead entry of the N. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 18 T. 1

S. R. 20 W. Arkansas, of which the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ was canceled Aug. 12/72 for conflict, at Washington, Arkansas, on Jan. 22, 1868, and is entitled to enter 120 acres additional public land under the provisions of sections 2306 and 2307 R. S., U. S., has executed proof papers, and assigned such right of entry to the undersigned, by an assignment in writing, dated June 27, 1908, and the undersigned has sold 80 acres of such right of entry to James T. Barron,

FOR VALUE RECEIVED, I, Anna Dunne, assignee of the original beneficiary, Richard J. Whitten, do hereby sell, assign and transfer unto the said James T. Barron and his heirs and assigns forever, 80 acres of the said right of entry, and authorize the said James T. Barron, his heirs and assigns, to make such entry of public land and receive patent therefor.

I further state, under oath, that I purchased said right for a valuable consideration and that I have made no other sale or use of the same and that I was the *bona fide* owner of said right when this assignment was made. [688]

Signed, sealed and delivered this 3d day of Dec., 1909.

ANNA DUNNE. (Seal)

Witnesses:

(1) JAMES DEERING.

(2) TED E. COLLINS.

State of Montana,

County of Lewis & Clark,—ss.

On this 3d day of Dec., 1909, before me personally came Anna Dunne, to me well known as the person

who executed the foregoing assignment, and acknowledged the foregoing assignment to be her act and deed for the purposes therein named; and being duly sworn, says the foregoing statements are true.

[James Deering—Notarial Seal, State of Montana.]

JAMES DEERING,

Notary Public for the State of Montana, Residing at
Helena, Montana.

My commission expires April 19, 1912. [689]

[Plaintiff's Exhibit "D."]

Barron vs. Alexander—Plffs. Ex. "D"—R. E. R.
Form 125-1908

SIGNAL CORPS, UNITED STATES ARMY.
TELEGRAM.

Received at

No. 11 Si. SC. CH. Wk. 23

P. Portland Ogn Mch. 28-1911.

Fred Barker,

Juneau, Alaska.

Commence construction of wharf from upland survey Eight hundred four out into navigable water chatham straits. Operate piledriver number two use cables freely.

JAS. T. BARRON.

10 am. [690]

[Plaintiff's Exhibit "E."]

Barron vs. Alexander—Plffs. Ex. "E"—R. E. R.
Form 125-1908

SIGNAL CORPS, UNITED STATES ARMY.

20

Telegram.

Received at

31SI. B. CH. N. 34. Paid.

P. Portland, Ore., Mch. 28, 1911.

Fred Barker,

Juneau, Alaska.

Subject to courts decision prepare pile driver number two assemble piling for wharf fronting survey eight hundred four. Mailing plan of wharf if necessary will go north immediately remaining short time awaiting news answer.

JAMES T. BARRON.

3:02 P. [691]

[Defendant's Exhibit No. 1.]

**POSTAL-TELEGRAPH COMMERCIAL
CABLES.**

Clarence H. Mackay, President.

TELEGRAM.

No.

Received at

Main Office, 126 Third Street.

Portland, Oregon.

Main 435

Telephones: Home A-1435

The Postal Telegraph-Cable Company (Incorporated) transmits and delivers this message subject to

the terms and conditions printed on the back of this blank.

16.P DESIGN PATENT No. 40529

D 8452

E 5694

378

120 Z BT 55 Collect via Seattle Wn.

Juneau Alaska Mar 27 1911.

Telephoned to J. T. Barron

H. E.

8 15 P

J. T. Barron

Wells Fargo Blg

Portland Org

Burton asks that you wire fully that it is your intention at once to build and construct wharf from Upland embraced survey 804 Alaska out and into deep and navigable waters chatham straits for access from said Upland to and into navigable waters and that you are sending affidavit to this effect.

FRED BARKER. 8 08 P. M.

Alexander vs. Barron—Defts. Ex. 1—R. E. R.

[692]

[Defendant's Exhibit No. 2.]

POSTAL TELEGRAPH—COMMERCIAL
CABLES

POSTAL TELEGRAPH

COMMERCIAL CABLES

Clarence H. Mackay, President.

CABLEGRAM.

Registered Trade-Mark. Design Patent No. 36369.

The Postal Telegraph-Cable Company (Incorporated) transmits and delivers this message subject to the terms and conditions printed on the back of this blank.

No.	Time	Check	Route Via
		Paid	

Chg. Thlinket Pkg. Co.

Send the following Cablegram, without repeating, subject to the terms and conditions printed on the back hereof, which are hereby agreed to.

Portland, Ore. Mar. 28, 1911.

To Newark L. Burton, Atty. at Law,
Juneau, Alaska.

It is my intention to construct at once wharf from upland embraced survey eight hundred four Alaska out and into deep and navigable waters Chatham Straits for access from said upland to and into navigable waters. Am sending by mail affidavit to this effect.

JAS. T. BARRON.

Alexander vs. Barron—Defts. Ex. 2—R. E. R.

The Sender will please read the conditions on back

and sign name and address thereon for reference. The Postal Company's system reaches all important points in the United States and British America, and via Commercial Cables, all the world. [693]

B Barron v. Alexander—Defts. Ex. 2—R. E. R.

THLINKET PACKING COMPANY.

Cannery at Funter Bay, Alaska.	Salmon Brands:
JAS. T. BARRON, Pres. & Mgr.	"Searose," High Grade Red Alaska.
M. G. MUNLY, Secretary.	"Tepee," Standard Medium Red.
C. T. WHITNEY, Mgr. Sales Dept.	"Buster," "Peasant," "Thlinket."
	Best Grade Pink.
	"Arctic Belle," Best Grade Chum.
	WE GUARANTEE OUR BRANDS.

Main Office

WELLS FARGO & CO. BUILDING.

PORTLAND, ORE.

2d Trial—Barron vs. Alexander—Defts. Ex. (13)—

Recd. in Ev. R. E. R.

Funter, Alaska, March 14th, 1911.

To The Tee Harbor Packing Co.,

Its Agent, or To Whom It May Concern,

You are notified herewith, that, in event of your jumping any of our trap locations, you do so at your own peril. We intend to drive and fish all our locations this season, and will protect our rights at all hazards.

THLINKET PACKING CO.

By JAS. T. BARRON—President.

B. [694]

[**Certificate of Clerk U. S. District Court to
Transcript of Record.**]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 840-A.

JAMES T. BARRON,

Plaintiff and Appellant,

vs.

CLAIRE J. ALEXANDER,

Defendant and Appellee.

I, E. W. Pettit, Clerk of the District Court for the District of Alaska, Division Number One, do hereby certify that the foregoing and hereto attached six hundred and ninety-four pages of typewritten and other matter, numbered from one to six hundred ninety-four, both numbers inclusive, constitutes a full, true and correct copy of the record, and the whole thereof, prepared in accordance with the praecipe of the appellant, filed herein and made a part hereof, in cause No. 840-A, entitled James T. Barron, Plaintiff and Appellant, vs. Claire J. Alexander, Defendant and Appellee.

I do further certify that the said record is by virtue of order allowing appeal and the citation issued herein and made a part hereof, and the return in accordance therewith.

I do further certify that the said record has been prepared by me in my office, and the costs of preparation, examination, and certificate amounting to Three Hundred Thirteen 40/100 (\$313.40) Dollars has been

paid to me by Messrs. Winn and Burton, attorneys for the plaintiff and appellant.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the above-entitled court, this 3d day of August, 1912.

[Seal]

E. W. PETTIT,

Clerk of the District Court for the District of Alaska,
Div. No. 1.

[Endorsed]: No. 2171. United States Circuit Court of Appeals for the Ninth Circuit. James T. Barron, Appellant, vs. Claire J. Alexander, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Received August 10, 1912.

F. D. MONCKTON,

Clerk.

Filed August 15, 1912.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

